U. S. GENERAL ACCOUNTING OFFICE: ANALYSIS OF SUSTAINED DECISIONS ON DEPARTMENT OF DEFENSE CONTRACT RELATED PROTESTS (1975-1978)

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THESIS

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ON DEPARTMENT OF DEFENSE
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by

Michael Elwood Younker

December 1979

Thesis Advisor: David V. Lamm

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U. S. General Accounting Office
Analysis of Sustained Decisions on Department of Defense
Contract Related Protests (1975 - 1978)

by

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I. INTRODUCTION

Department of Defense (DOD) acquisitions are conducted in accordance with procedures specified in the Defense Acquisition Regulations (DAR). These regulations incorporate applicable Public Laws and other governmental agency procedures which impact on Defense procurement. Incorporating these other procedures is necessitated by the fact that the DAR addresses the entire acquisition and contracting process from inception to completion. Additionally, as an agency of the public sector, the Department of Defense is responsible to equitably apply all legal governmental requirements to the private sector.

One such procedure, steeped both in public law and principles of equitable application, are those dealing with disputes of award, hereinafter referred to as protests.

Protest procedures have evolved separately from other contract dispute procedures. This is so because formal dispute procedures apply only to those instances in which privity of contact between private concerns and the Government exists. In order to give standing to parties interested in bidding on Government contracts, the General Accounting Office (GAO), an arm of the United States Congress, has established protest procedures. These procedures, applying to all Government acquisition and contracting agencies, are published by the GAO as part of the Code of Federal Regulations (CFR) [40], and are incorporated into the DAR. [38: 2-407.8]

GAO assumes protest review authority under the Budget and Accounting Act of 1921. The following excerpts of the 1921 Act are incorporated in the existing U. S. Code:

> The Budget and Accounting Act grants GAO authority to settle and adjust all claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor. [36] In settlement of public accounts, balances certified by the General Accounting Office shall be final and conclusive upon the Executive Branch of the Government. [37]

Interpretation of the above excerpts further explains the GAO perception with respect to protest review authority:

> While the foregoing statutes contain no authority for GAO to adjudicate award protests; GAO has interpreted its duty to audit and settle public accounts as containing an obligation to determine the legality of contract expenditures and assure compliance with the laws and regulations relating to expenditure of public funds. GAO has concluded that by deciding award protests it is preventing unauthorized payments by determining in advance, the validity of a contract that obligates public funds.[1] [9:40]

Some dissension has, however, been raised by members of the Executive Branch and the acquisition community. In 1971, the Attorney General of the United States expressed the view that:

> The authority to withhold awards and reject bids is reposed by statute only in the heads of Executive Departments or Agencies, and certain specified offices of the military departments. [9:41]

The Congress and courts do not agree with the Attorney General. Additionally, in 1972 the Commission on Government Procurement (COGP), established by public law 91-129,

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[1] Award protest, as defined by the COGP, includes protests of awards, solicitations, and bids.

recommended the continuance of GAO as the award protest reviewing authority.

In January 1979, the Federal Acquisition Reform Act was introduced into the 96th Congress as Senate Bill S.5. Title VII of this Bill authorizes GAO to be the overall protest reviewing authority as specified in the Budget and Accounting Act. [42] Passage of S.5 into public law will, after 58 years, specifically identify the General Accounting Office's authority in a statute.

In fact, GAO has never stopped reviewing protests since 1924. Each year since, and especially in the 1970's, the number of cases received has exhibited an increasing growth rate. As an example, in 1970, 771 protests were reviewed and 35 were sustained. In 1977, 1,664 were reviewed, of which which 97 were sustained.

The importance of the decisions rendered by the GAO is summarized in the following abstract:

> GAO's separation from the contracting agencies assures contractors that their complaints are considered free from any bias toward individual agency policies and thus promotes the confidence of both private enterprise and the general public that Government business is conducted with integrity. Such separation from the daily concerns of the contracting agencies also allows GAO to frame and solve problems in terms of the overall best interests of the Government. The award protest decisions issued by the Comptroller General within the past five decades form a cogent body of Government Contract Law that is useful for guidance in solving individual problems occurring in contract award process and provide a basis for development of more generally applicable procurement regulations. GAO's establishment as an administrative forum potentially allows it to afford a speedier solution of disputes than would be possible if Federal Courts were the only arbiter. [9:41]

The protestor has three avenues which he may pursue. He may submit directly to GAO in accordance with Title 4 of GAO regulations as described above, or he may go directly to the Federal Courts (a procedure implemented in 1970). His third recourse is to protest directly to the agency involved, [38:407.8] No matter which of the three entry paths he uses the ultimate result will, most likely, be a GAO decision. This is so, because an agency decision can be appealed to either GAO, or the courts, who almost always defer to GAO on these matters.

The resolution of a protest which GAO reviews, will have one of four outcomes: (1) Dismissal, usually the result of late protest submission to GAO, is considered to be untimely; (2) withdrawal by the protestor, is generally the result of legal considerations; (3) a decision is rendered, but the protest is denied because of insufficient proof of the allegations made, or improper evidence upon which to render a sustained decision; (4) a decision is rendered and the protest is sustained, resulting in a GAO recommendation for action.

The essence of this study is to analyze the last of these categories, sustained decisions resulting from protests submitted against Department of Defense contract solicitations or awards, for the period 1975 through 1978. The hypothesis is that valuable lessons can be learned by such an analysis.

A. STATEMENT OF THE PROBLEM

At present, there is no systematic method by which individual acquisition managers can incorporate the precedents established by GAO protest decisions into their day-to-day operations. Decisions can be retrieved either from the General Accounting Office's Index of Decisions section or from the Federal Legal Information Through Electronics (FLITE), a computer based information exchange service located in Denver, Colorado. In addition, certain GAO publications present protest decisions on a periodic basis.

For legal matters, these publications serve their purposes very well. They do little, however, to give Acquisition Managers the extensive overview required of the protest review process. This study addresses that need.

Case material for this study is available from Federal Legal Information through Electronics (FLITE). All Comptroller General Decisions, published or unpublished, are available. Decisions are addressable by any descriptor in the heading, or text of the decision. Words, lines, statements, or letter-number combinations are addressable.

Unfortunately, the individual Contracting Officer probably does not have the time, nor the capability to review each case, even if he were to limit his study to cases within his branch of service. Too many cases must be analyzed in order to obtain meaningful analysis data. In 1977, for example, GAO reviewed 442 protests against DOD contracts as follows:

Air Force, 98; Army, 147; Navy, 114; Marine Corps, 6; Defense Logistics Agency, 74; Others, 3.

What is needed, is an analysis of sustained GAO protests with a view toward surfacing recurring problem areas which might be the basis for improved contracting procedures and responses to protests.

B. OBJECTIVES AND RESEARCH QUESTIONS

The overall objective of this study is to improve the DOD acquisition process as it relates to conditions which have traditionally led to protests. The approach taken with regard to this objective is: analysis of all identifiable DOD related protest decisions sustained by the GAO, for the years 1975 through 1978 and evaluation of conclusions drawn from this analysis, and communication of the results to acquisition managers in a useful format.

The following research questions will be pursued throughout this study:

1. Can meaningful conclusions and lessons learned be drawn from a systematic analysis of sustained GAO protest decisions?

2. Can these conclusions and lessons learned be transformed into recommendations which, when transmitted to acquisition managers, have the potential to decrease future protests and improve the acquisition process?

C. STUDY LIMITATIONS AND ASSUMPTIONS

The GAO protest review procedures supplement those of the Contracting Officer as outlined in DAR. As such, these procedures are administrative in nature. Protest decisions are rendered by attorneys in the GAO Office of the General Counsel, and are therefore, based upon legal principles. These decisions are considered binding upon Government Agencies. They do not, however, bind the protestor, who can further appeal to the courts, as the highest reviewing authority. Court decisions are, of course, legal and binding upon both the Government and the protestor.

The researcher's limited legal background might tend to bias this analysis. This deficiency, however, is partially overcome because each GAO decision analyzed contains a full explanation of pertinent legal doctrine within the text of the decision.

The study of Government protests is an enormous field which this study limits to the Department of Defense, only for the period 1975 through 1978. The field is further reduced to only those protests reviewed and sustained by the General Accounting Office. This study does not examine protests considered by the courts, or other agencies, which are not sustained by GAO. Nor, does it consider protests denied, withdrawn, or dismissed. It does, however, consider the three major classifications of contracts; Supply, Service and Construction.

Contracts emanating from the Department of Defense include those of the Army, Air Force, Navy and Marine Corps, and the Defense Logistics Agency (DLA). Additionally, the Office of the Secretary of Defense (OSD) awards a small number of DOD contracts each year.

Protests are analyzed within this study in four categories: (1) Army; (2) Air Force; (3) Navy/Marine Corps, and (4) DLA (formerly the Defense Supply Agency--DSA). These four categories include over 99% of all DOD protests for the year studied. It is assumed that the additional 1% which are not analyzed would not significantly alter the results presented herein.

The Defense Acquisition Regulations (DAR), known as the Armed Services Procurement Regulations (ASPR) prior to 8 March, 1978; Government Contract Law (GCL); the report of the Commission on Government Procurement (COGP) of 1972; and the COGP Final Assessment by the General Accounting Office (May 31, 1979) are the primary sources for policy and interpretations. These publications indicate the bias of the researcher; that of a Field Contracting Officer.

It is assumed that the reader of this study is familiar with contracts, the acquisition process within the U. S. Government, Contract Law, and the functions of the General Accounting Office.

D. LITERATURE SEARCH

The literature search encompassed the Naval Postgraduate School's Thesis, Acquisition research, and Main Libraries.

Within the main Library, a Defense Documentation Center (DDC) screen was requested and conducted. The computerized data bases of the Federal Legal Information Through Electronics (FLITE) and the Defense Logistic Studies Information Exchange (DLSIE) were also inquiried, as was the General Accounting Office's Index of Decisions section.

The Legal Officers' Libraries at the Naval Postgraduate School and Fort Ord Army Base were also consulted. The most successful inquiries for this research were DLSIE and FLITE. In particular, FLITE provided the most significant data with which this study was conducted.

No studies of a similar nature were encountered during the research. Reference works providing background information were located through DLSIE and the Postgraduate School Thesis Library.

Basic data for analysis was most successfully provided by FLITE. The same information is available through the GAO Index of Decisions, but it is neither computerized, nor addressable in the required form. Limited data is available in Legal Libraries within Comptroller General Published Decisions (1921-August 1977).

DLSIE provided Comptroller General Annual Reports to Congress for the period 1969-1978.

The service provided by FLITE was invaluable to this study. Without this service and the flexibility and understanding exhibited by the FLITE attorneys, such a study

would most likely have been impossible. All decisions analyzed were provided by FLITE, in the format requested by the researcher.

E. ORGANIZATION

Chapter I introduced the general area of study to which this work relates. The problem statement focused upon the compelling need for this work. The objectives were then formulated from the above problem statement. Two research questions were posed for the purpose of directing the analysis toward the objectives, and ultimately, solution of the overall problem. Study limitations and assumptions were listed to explain the researcher's perspective, and to give the reader the ability to identify unintended biases contained in the analysis. The Literature Search section explained the procedures by which, and the means through which, information was researched and obtained. The Organization section explains the presentation of this study.

Chapter II, the Framework, explains in more depth, the background and resolution of protests. Insight into the reasons for protests, and the magnitude of the problem is presented. Finally, the focus of this study is put into perspective.

Chapter III identifies the research and describes the methodology by which data was collected and analyzed. The data is presented, and though related to the overall population, contains some inherent problems. These problems are examined with respect to their impact on the study.

Chapter IV is the Data Analysis Section. Selected cases are grouped by protest reason. Individual representatives of these groups are then analyzed. Additional relevant factors, not identified in the above analysis, are also presented.

Chapter V answers the study's research questions and presents conclusions in the form of lessons learned, based on the research and analysis performed.

Chapter VI summarizes the studies and makes recommendations for improvement of the acquisition and contracting process based upon the lessons learned.

II. FRAMEWORK

Webster's New World Dictionary defines protest, as used in the context of this study, in two ways; as "an objection or remonstrance" and as "a document formally objecting to something." [43] Both of these definitions are appropriate. They must, however, be further limited within the contracting environment and GAO protest procedures.

The DAR simply refers to protests as "objections to the award of a contract." [38:2-408.8] The most comprehensive reference comes from the Report of the Commission on Government Procurement:

> Disputes occur during the process that leads to the award of a Government contract. These disputes are called "award protests" and may be defined as complaints lodged by interested parties against any part of the contract award process. Protests are usually initiated by a company that has made an offer for a Government contract or would like to make an offer. Typical protests have included allegations that (1) the technical evaluation of a proposal was not properly conducted, (2) the type of solicitation used was not in accordance with statutes or regulations, (3) the low bidder was not qualified to perform the work, or (4) the bidder who was awarded the contract was not responsive to the terms of the solicitation. [9:5]

It can be clearly seen from above that a protest is administrative in nature, is not a dispute as defined by DAR, yet, like a dispute, it can ultimately be resolved by a court of law. None of the rules governing contract disputes apply to the protest process. It is a remedy within the acquisition and contracting process that is unique unto itself. Referring again to the Report of the Commission on Government Procurement:

Unlike disputes occurring under a contract, no clause in the solicitation gives the offeror a right to protest. Nor is such right found in any statutory language. The basic executive procurement regulations and procedures promulgated by the General Accounting Office (GAO) permit protests against the award of a contract to be lodged with the agency that solicited the award and with GAO. Protests also may be filed with U. S. district courts or the Court of Claims. [9:5]

The protest review system described above has been fully explained in the introductory chapter, but is illustrated below for clarification, as Figure 1.

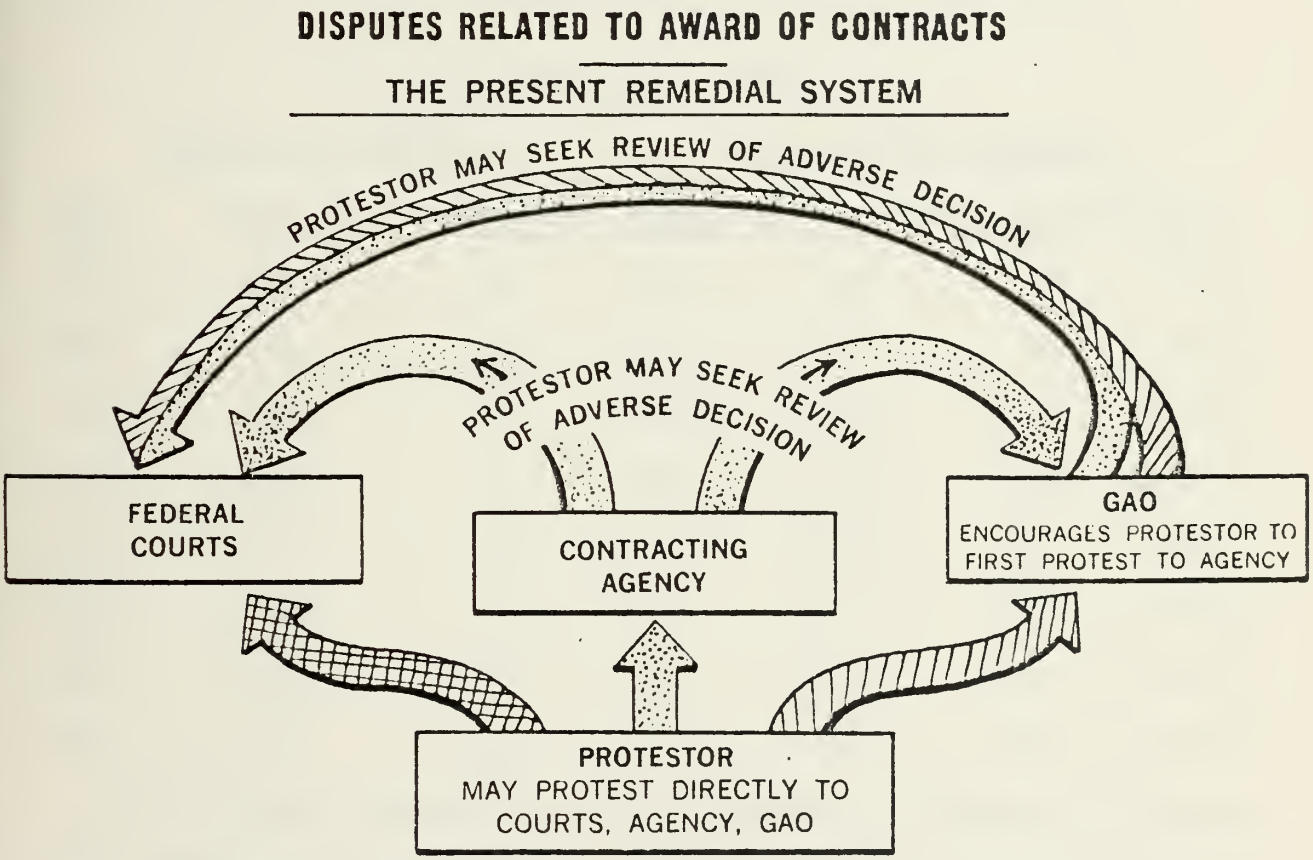

Figure 1.

The evidence is overwhelming that protests are being submitted at an ever-increasing rate. As previously mentioned, from 1970 to 1977, protests received by GAO, increased from

771 to 1,664, a growth rate of 115%. As would be expected, the number of sustained protests has increased over the same period from 35 to 97, which represents a 177% growth rate. Thus, not only are more protests being reviewed each year, but the percent of protests sustained is increasing at an even greater rate. It is clear then, that an effort to reduce the numbers of protests, and particularly those sustained, is becoming increasingly more important. The following chart presents GAO protest figures for the 1970-1977 period.

GAO Protest Reviews 1970-1977

	Decision Rendered			No Decision Rendered		
Year	Denied	Sustained	Sub-Total	Withdrawn	Dismissed	Total
1970	548	35	583	123	65	771 [1]
1971	641	74	715	274	65	1054 [2]
1972	706	52	758	299	170	1227 [3]
1973	542	40	582	326	188	1096 [4]
1974	534	44	578	320	161	1059 [5]
1975	493	46	539	327	227	1093 [6]
1976	889	89	978	507	300	1785 [7]
1977	723	97	820	435	409	1664 [8]

The reasons underlying this tremendous growth may be more knowledgeable contractors and fewer Defense dollars, as suggested by Major Joel LeFave in his thesis, The Procurement Protest. The following excerpts support these contentions:

> Beginning in 1968, however, aerospace activity underwent a sharp decline. Competition for Federal resources produced a tendency to curtail Defense expenditures.

> This curtailment of Defense expenditures is causing a change in contractor behavior patterns. They protest more, by-pass administrative channels, file claims for all the extra dollars they can wring from contracts. [35]

Major LeFave continues to suggest that aversion to the recent Governmental moves toward more risk type contracts and possibly, poor standing of some contractors may also contribute to the increasing number of protests.

To agree or disagree with the above thesis, is not the purpose of this study. It is clear, however, that some impetus, probably multi-faceted in nature, is driving interested parties to submit increasing numbers of protests to GAO. It is also clear that increasing numbers of sustained protests direct attention to either increased knowledge exhibited by protestors, or increased inefficiencies within the conduct of the acquisition and contracting processes. Discovering, and ultimately correcting such inefficiencies, particularly those of a recurring nature, is a major motivation for this research. The possibility that contractors are exhibiting greater knowledge in the protest process, seems to be a positive sign, and is not a subject which this study pursues.

Department of Defense protests form a sub set of all protests reviewed by the GAO. Other government agencies falling under GAO cognizance, and whose acquisition and contracting procedures are outlined in the Federal Acquisition Regulations (FAR) include the Executive Departments and other Governmental Commissions and Administrations. The largest of these, in terms of protest activity, are the Departments of Agriculture

(DOA); Health, Education and Welfare (HEW), Interior (DOI), and Transportation (DOT); the General Services (GSA), Veterans (VA), and National Aeronautics and Space (NASA) Administrations.

These other agencies, of which there are presently 26, account for less than 40% of GAO's review activity, annually. Thus, DOD has a majority of the protest activity, and as such, reflects in good measure, performance of the entire Government in this field. Comparison of DOD related, as a percentage of total protests reviewed by GAO, reveals the following:

Year	1970	1971	1972	1973	1974	1975	1976	1977
Annual DOD Protests Reviewed	346 [1]	425 [2]	529 [3]	378 [4]	364 [5]	334 [6]	576[1]	442[8]
Percent*	59	59	69	65	63	62	59	54

*Percent = $\frac{\text{Annual DOD Protests Reviewed}}{\text{Total Annual Protests Reviewed (Figure 1 subtotal)}}$ by GAO

The consistency of these figures is remarkable. It can be seen that the range is from 54 to 69% for these years, and the median is 62%.

So, not only does DOD have the majority of Government protests, it also has very nearly the same percentage of the total, each year. It emerges therefore, as an excellent yardstick by which to measure all protest activity within the GAO cognizance. For the above reasons, this study analyzes only DOD protests.

III. METHODOLOGY

A. POPULATION DESCRIPTION

The sample for this study consisted of 22 DOD protests reviewed and sustained by the General Accounting Office, from the period 1 January 1975 through 31 August 1978. This sample was extracted from a population of cases provided by the Federal Legal Information Through Electronics information exchange for this period. Table I, below, identifies GAO sustained protest totals, and the DOD population identified by agency and calendar year.

TABLE I.

SUSTAINED GAO PROTESTS (1975-1978)

	ALL PROTESTS TOTAL	ARMY	NAVY*	AIR FORCE	DLA	DOD PROTESTS TOTAL
1975	46	16	6	2	3	27
1976	89	8	8	10	5	31
1977	97	14	3	3	2	22
1978	**	2	2	1	1	6
		40	19	16	11	86

* Includes both U.S. Navy and U. S. Marine Corps.

** 1978 information was not available for entire calendar year at time of this study.

Source: Developed by Reseacher.

The selection of sustained protests was made on the premise that denied, dismissed, and withdrawn protests represent situations in which contracting actions within DOD were

essentially correct, therefore precluding any meaningful analysis. Sustained decisions are always accompanied by a GAO assessment of the Contracting Agency's procedures, and recommendations for action. For the above reasons, it is the researcher's belief that analysis of these decisions provides the most valuable information that can be gleaned from the protest review process.

Table II illustrates the various protest reasons and the quantities of the population applicable to each DOD agency, by year.

TABLE II

DEPARTMENT OF DEFENSE
SUSTAINED PROTESTS
JAN 1975 - SEPT 1978

REASON CATEGORY	ARMY	NAVY/MC	AIR FORCE	DLA	TOTAL
1. PRICING					
A. NON-RESPONSIVENESS	2	-	2	1	5
B. CONTRACTOR ERROR	-	1	3	-	4
C. BID PROTEST	3	-	1	-	4
2. WAGE DETERMINATION	2	-	2	2	6
3. TECHNICAL					
A. RESTRICTIVE SPECIFICATION	4	1	1	1	7
B. IMPROPER DATA SUBMISSION BY BIDDER	1	1	1	-	3
4. LEGAL	1	-	-	-	1

5. IMPROPER HANDLING OF BIDS BY THE GOVERNMENT AGENCY					
A. INTERNAL	-	-	-	1	1
B. POSTAL	2	-	-	-	2
C. INFORMATION DISCLOSURE	-	1	-	-	1
6. VIOLATION OF BUY AMERICAN ACT	1	-	-	-	1
7. IMPROPER EVALUATION DUE TO TECHNICAL CONSIDERATIONS	1	2	-	-	3
8. IMPROPER APPLICATION OF REGULATIONS					
A. BASIC ORDERING AGREEMENT	1	-	-	-	1
B. GSA COGNIZANCE	-	1	1	-	2
C. IFB vs. RFP FOR MESS ATTENDANT SVCS	-	1	-	-	1
D. SOLE SOURCE DETERMINATION	-	-	1	-	1
9. IMPROPER APPLICATION OF EVALUATION CRITERIA	8	6	4	2	20
10. SOLICITATION ERRORS AND CHANGES	9	2	-	3	14
11. AFFIRMATIVE ACTION CRITERIA	1	-	-	-	1
12. REQUIRED DAR REVISION	1	-	-	-	1
13. IMPROPER NEGOTIATION	-	1	-	-	1
14. REQUIRED CERTIFICATIONS (SBA, ICC, etc.)	3	2	-	1	6
TOTALS	40	19	16	11	86

Source: developed by Researcher

The above tables show that improper applications of evaluation criteria established in solicitation documents, and solicitation errors and changes, are the two most common reasons that contractors protest.

Each of the categories listed in Table II are briefly explained below:

1. Pricing - These protests key on the proposed contract price submitted by one of the bidders.

a. Nonresponsiveness - The protestor faults the deliberate pricing practices of another bidder, claiming his bid to be nonresponsive.

b. Contractor error - The protestor faults the methods of pricing of another bidder, which are the results of unintentional bid errors committed by the bidder in question.

c. Bid protests - In these cases the contracting agency has determined the protestor's bid to be nonresponsive due to improper pricing.

2. Wage Rate Determinations - A protest has been submitted to GAO as a result of wage determinations established by the Department of Labor. These wage rates have caused a conflict in the contracting process.

3. Technical - Protests in this category are the result of deviations in the contracting process from the normal practices within a specific art, craft, science or profession as identified by the protestor.

a. Restrictive specifications - The protestor is questioning the validity and necessity of all the requirements enumerated in the solicitation document.

b. Improper data submission by the bidder - One or more of the interested parties has submitted a technical proposal which violates the specifications of the IFB.

4. Legal - Protestor has identified a violation of legal principles in the contracting process.

5. Improper handling of bids by the Government Agency - Protests have resulted from mishandling of bids by the contracting agency, in violation of existing regulations.

a. Internal - Handling procedures within the contracting agency have caused the protest.

b. Postal - Protests have identified contracting agency policies which created postal delivery problems, causing bids to arrive after bid openings.

c. Information disclosure - Contracting agencies have erroneously disclosed bid information to a competing bidder, in violation of regulations designed to preserve competition.

6. Violation of the Buy American Act - Improper application of regulations contained in 41 U.S.C. Section 10(A) of 1970 (the Buy American Act) has generated protests.

7. Improper evaluation due to technical considerations - This category is a combination of Category 3, Technical, and Category 9, Improper evaluation. These protests occur when technical problems arise in either a bid or solicitation, and the contracting agency compounds the problem by taking no action to eliminate these deficiencies in the bid evaluation process.

8. Improper application of regulations - This category pertains to agency violations of existing acquisition and contracting regulations, which result in protests during the contracting process.

a. Basic Ordering Agreement (BOA) - Violations of BOA regulations occur in the contracting process as a result of agency misapplication.

b. GSA cognizance - Certain classes of materials must be cleared through the General Services Administration (GSA) before they can be purchased by Government contracting agencies. These materials are identified in the Defense Acquisition Regulations (DAR).

c. IFB vs. RFP for mess attendant services - GAO has identified specific guidance for mess attendant services which is not always adhered to by contracting agencies.

d. Sole-source determination - Authorized use of negotiation under one of the 17 DAR exceptions does not, of itself, give a contracting officer the right to make a sole-source determination. Protests relating to this practice have occurred.

9. Improper application of evaluation criteria - For a variety of reasons, bid evaluations are inconsistent with the terms, conditions and specifications in the solicitation document, or for some other reason are unfair to one or more bidders.

10. Solicitation errors and changes - Solicitation errors are identified, and changes are taken exception to, which generate protests from the aggrieved bidders.

11. Affirmative action criteria - All bidders must comply with the Government's criteria for affirmative action. Failure to do so may result in a nonresponsive determination, or in a protest from a bidder who is in compliance.

12. Required DAR revision - In some instances, current DAR procedures may be the cause of unnecessary problems for a bidding contractor. Protests bearing upon this situation have occurred and when sustained by GAO, necessitate formulation of new procedures.

13. Improper negotiation - The acquisition and contracting regulations specify strict procedures which are to be followed in the conduct of negotiated acquisitions. Violation of these procedures by a contracting agency is an open invitation for protestors.

14. Required certifications (SBA, ICC, etc.) - Bidders on Government contracts must possess those qualification certificates required by law and the solicitation document. Failure of a bidder to possess such qualifications can result in a protest by another bidder, who is certified.

Even though some qualified, none of the 86 cases in the population of this study were listed in more than one reason category. Each case was categorized by its most specific protest reason, when it contained elements of two or more categories. Those cases listed in general categories, 9 and 10, did not apply to any of the more specific areas.

B. SAMPLE DESCRIPTION

A sample from the population was necessary in order to properly focus the study. One representative case was analyzed for each category listed in Table II.

Table III shows the Agency to which, and the year in which, each of the sample cases was directed.

TABLE III.

PROTEST REASON VS. AGENCY AND YEAR

PROTEST REASON	POPULATION QUANTITY	AGENCY OF CASE ANALYZED*	CALENDAR YEAR
1. A.	5	A/F	76
1. B.	4	N	78
1. C.	4	A/F	78
2.	6	A/F	76
3. A.	7	N	76
3. B.	3	N	77
4.	1	A	77
5. A.	1	D	75
5. B.	2	A	77
5. C.	1	N	76
6.	1	A	78
7.	3	N	75
8. A.	1	A	77
8. B.	2	A/F	77
8. C.	1	N	75
8. D.	1	A	75
9.	19	N	76
10.	14	N	76
11.	1	A	77
12.	1	A	75
13.	1	N	76
14.	6	N	76

*A - Army N - Navy/Marine Corps A/F - Air Force D - DLA

Source: Developed by Researcher

Table III manifests the cross-section of the sample by agency and year. All agencies and years within the study are represented. This cross-section is summarized in Table IV.

TABLE IV.

SUMMARY OF SAMPLE FOR THIS RESEARCH

AGENCY	YEAR 1975	1976	1977	1978	AGENCY TOTALS
ARMY	2	0	4	1	7
NAVY/MC	2	6	1	1	10
AIR FORCE	0	2	1	1	4
DLA	1	0	0	0	1
YEARLY TOTALS	5	8	6	3	22

Source: Developed by Researcher

It is noted that the 22 categories analyzed represent more than 25% of the population. With the exceptions of Categories 1, 2, 3, 9, 10 and 14, the analysis represents 13 of the remaining 17 cases.

Additionally, Table IV indicates a representative sample of all the agencies and years pertinent to this study. The sample was selected on the basis of the most representative case from each protest reason category. No consideration was given to placing emphasis on the individual agencies, or years involved.

C. DATA COLLECTION PLAN

First, the General Accounting Office (GAO) was contacted as a source of the desired data. The GAO Index of Decisions maintains files for all its decisions and studies. Its personnel attempted to provide the needed data, but were unable to

do so because of the incompatibility of their indexes with the requirements of this study.

The second approach was to obtain the needed information from publications issued by the General Accounting Office. This included the following: (1) Decisions of the Comptroller General of the United States, (2) Procurement Law, Quarterly Digest of Unpublished Decisions of the Comptroller General of the United States, (3) Decisions of the Comptroller of the United States, Scope Line Index, and (4) The Comptroller General's Procurement Decisions (CPD's). None of these publications proved useful for the same reason indicated above, the incompatibility of these publications' indexes with the requirements of this study. Each of the above publications contains some of the required information, but are, unfortunately, incomplete with respect to the total thrust of this research effort.

The third approach was to utilize the Federal Legal Information Through Electronics (FLITE) legal information exchange. FLITE is an activity of the Department of Defense, operated by the Judge Advocate General's Department, United States Air Force.

FLITE is a computerized legal research service available at no cost to DOD personnel and activities. For the objective of this study, FLITE eventually provided all the data which is contained within the population, previously identified. Several evolutions were required, because of the programming and data extraction methods applicable to the FLITE computer.

Decisions of the Comptroller General must be obtained from two listings; (1) Unpublished Decisions of the Comptroller General, listed by B-series decision number, from 1921 through August 1978, and (2) by Comptroller General Published Decisions identified both by B-series and Comp Gen decision number, from 1921 through September 1977. Individual descriptors can be used to obtain desired data, but knowledge of the data bank is absolutely necessary. This is so, because categories of decisions are not strictly maintained, and extraction of denied, sustained, withdrawn, and dismissed decisions within individual agencies' cognizance, requires very careful programming. This cannot be achieved unless researcher, FLITE lawyer, and FLITE programmer are in complete harmony. FLITE contains valuable information for an effort of this nature, but the researcher must learn the characteristics of the system in order to retrieve that which he requires.

IV. ANALYSIS OF SUSTAINED PROTESTS

A. GENERAL

An in-depth analysis was performed on the 22 cases selected as the sample for this study. Each case represents a separate protest reason category.

Each of the cases is analyzed in a ten-step approach. The first six of these steps consists of identification data for the case. Then, a summarized narrative of the case is presented, and finally, the last three steps analyze, criticize, and indicate GAO's action recommendations. The following is an explanation of these steps:

1. Type of protest, of which there are three. Award protests are those which take exception to the award of a contract to other than the interested party. They may be pre- or post-award. Bid protests take exception to elimination of the interested party from the competitive range, and claim that the Government's determination of nonresponsiveness is incorrect. Solicitation protests take exception to either Invitation for Bids (IFB's) under Formally Advertised procurements, or Requests for Proposals (RFP's) under Negotiated procurements. All of these protests effectively block the award of a contract, unless already made, because questions arise regarding the protest, and must be resolved before an awardee can be determined. Procedures for awarding in the face of a protest, on an exception basis, do exist, however.

It should be noted by the above definitions that the three types of protests are mutually exclusive as utilized in this study.

2. Method of Contracting, of which there are two. Formal Advertising under an Invitation for Bids (IFB) is the required procurement method, unless one of the 17 specific exceptions listed under 10 United States Code 2304(a)(1) through (17) applies. [38:3-210.2] When one of the exceptions applies, Procurement by Negotiation is conducted. The solicitation is then called a Request for Proposal (RFP). In general, formal advertising is used in competitive situations where award of a firm fixed-price contract can be made. Negotiated procurements apply, generally, to situations where the conditions for formal advertising do not exist. Hence, one or more of the 17 exceptions apply.

3. The protestor's name and his form of business are identified.

4. The type of service to be performed, or goods to be provided by the contractor, is indicated.

5. The specific DOD Agency issuing the solicitation document is identified.

6. The reason for the protest, as identified in Table II is stated. Fourteen major reason categories are identified, four of which contain two or more sub-categories. Each subcategory is treated as a separate and unique entity throughout the analysis, because this study attempts to pinpoint specific causes and remedies.

7. A brief narrative of the case is presented.

8. Lessons to be learned from the case are formulated and discussed.

9. Criticisms are made with reference to problems, which either caused the protest, or aggravated the procurement process in some other way. Consideration is given to the systems involved, personnel errors, lack of control, and failure of the checks and balances, from both the Governmental, and contractor point of view.

10. The GAO Recommendation for Action is presented. Ten unique recommendations have been identified:

a. Termination of the present contract.

b. Resolicitation of the IFB or RFP.

c. Award to the protestor.

d. Make no alterations to the present contract--but alter future procedures.

e. Make no alterations to the present contract--but exercise no further options.

f. Confirm a certificate of competency.

g. Eliminate a nonresponsive bidder.

h. Consider the protestor's bid.

i. Re-evaluate best and final offers.

j. Reinstate the original solicitation document.

B. CASE ANALYSIS

Each case is keyed to a reason category, eg. 1a, 2, 4. There is one case presented for each sub-category in the same order as listed in Table II.

1. Case 1a. B-186733, August 19, 1976

a. Protest of award

b. Invitation for Bids (IFB)

c. Thomas Construction Company

d. Renovation of Hangar at Bangor International Airport, Bangor, Maine

e. United States Property and Fiscal Officer, National Guard Bureau, Department of the Army and Air Force

f. Pricing - nonresponsive (1a)

g. Thomas Construction Company has protested the consideration of bids of Coronis Construction Company and Nickerson and O'Day, Inc., for award, contending that both bids are nonresponsive. Coronis was requested by the procuring activity on June 18, 1976, to extend its bid for an additional 30 days. On June 23, 1976, Coronis replied that it would agree to the bid delay, but could not, as a result of this delay, install the hangar doors until early in the Spring of 1977. The IFB required contract performance not later than 185 days following the date of the notice to proceed. GAO ruled that Coronis was nonresponsive because;

> It is well established that a bid which fails to meet the delivery schedule set by an invitation must be rejected as deviating from the material requirements of the IFB. [16]

Thomas contended that Nickerson was nonresponsive because of its failure to list its proposed subcontractors in the bid, as specified in the IFB. Nickerson had placed an "X" on the form rather than filling in the list. When contacted by the contracting officer following bid opening, Nickerson advised

that this deviation had been an oversight, and verbally advised of its subcontractors, following up later in writing. The procuring activity considers Nickerson's bid nonresponsive.

h. Two lessons are forthcoming from the case. First, in the instance where a contractor is asked by the contracting agency to extend his bid, and he replies in the affirmative, but takes exception to the original salient terms of the solicitation, his bid is nonresponsive. Second, in the instance where pricing data requested in the solicitation document has been omitted by the bidder, but is subsequently submitted after bid opening, the bid may, again, be nonresponsive.

i. Since both GAO and the contracting agency are in agreement, it was unnecessary for Thomas to protest to GAO. A protest to the contracting officer would have been more appropriate and expedient.

Both Nickerson and Coronis failed to properly respond to the IFB. Nickerson was careless, and Coronis, apparently, did not understand the terms of the solicitation. Each of them wasted both the Government's and their own time, by so doing.

j. GAO recommended elimination of both nonresponsive bidders. (Recommendation 7)

2. Case 1b. B-190878, May 4, 1978

a. Award protest

b. Invitation for Bids (IFB)

c. Ainslie Corporation

d. Provide 16 AN/BRA-34 combined communications mast antennas (6 model A, 10 model B), spare cables and an option for two model A's and seven model B's.

e. Washington Navy Yard, Naval Sea Systems Command, Washington, D.C.

f. Pricing - contractor administrative mistake (1b).

g. Ainslie protested against the proposed award to the Granite State Machine Company, maintaining that Granite State's bid contains no prices for option quantities, and should be deemed nonresponsive. The IFB required bid prices for the basic requirements and the option quantities. Granite State failed to bid on the option quantities. After bid opening, Granite State was contacted by the contracting agency, and replied that the option quantity prices had been erroneously omitted. The prices which should have been submitted with the bid were then given to the contracting agency. The Navy considered the omission as merely a clerical error, not affecting the responsiveness of Granite State's bid. Ainslie, as previously stated, took exception to the Navy's determination.

GAO would have agreed with the Navy only if the bid as submitted, indicated not only the possibility of error, but also the exact nature of the error, and the amount involved. In further clarification, GAO stated:

> This exception is based on the premise that where the consistency of the pricing pattern on the bid establishes the error and the price, to hold that bid nonresponsive would be to convert an obvious clerical error of omission to a matter of nonresponsiveness. [23]

In the Granite State case, GAO felt that a reasonably clear bidding pattern for the regular quantities existed, but that extension of this pattern to the option quantities, was unjustified.

The rule applying when the above exception is not considered valid, states:

> A bid is generally considered as nonresponsive on its face for failure to include a price on every item as required by the IFB and may not be corrected. [18] This rule is applicable to option items, such as those in this case, which are to be evaluated at time of award. [22]

GAO ruled Granite State's bid to be nonresponsive.

h. A bid in which prices are omitted is nonresponsive, and must be rejected, except in limited circumstances where from other prices in the bid, a consistent pattern is discernible, which establishes evidence of error and the intended bid. Where option quantities are unpriced, no consistent pricing pattern exists, and the bid must be rejected.

i. The contractor (Granite State) was in error by failing to properly respond to the IFB. The contracting agency was at fault by attempting to stretch a previous GAO decision, regarding pricing of regular items, to option items required by the solicitation.

j. GAO determined Granite State's proposal to be nonresponsive. (Recommendation 7)

3. Case 1c. B-191749, August 16, 1978

a. Bid protest

b. Invitation for Bids (IFB)

c. Shamrock Five Construction Company

d. Air Force Contract Management Division, Kirtland AFB, New Mexico

e. Replacement of Garage Doors on 700 Military Housing Units

f. Pricing - nonresponsive bid protest (lc.)

g. Shamrock Five Construction Company protests the proposed rejection of its bid as nonresponsive. Nine bids were received by the contracting agency and opened on April 11, 1978. Shamrock, having been notified just prior to bid opening, by their supplier, of a $15,000 price reduction, notified the contracting officer of the change, as follows:

"ITEM	DESCRIPTION	EST. QTY	UNIT PRICE	AMOUNT
0001	Install new garage doors	700EA	$304.92	$213,444.00
0002	Remove garage doors	700EA	$ 10.43	$ 7,301.00
	Total items 0001 and 0002 ~~$220,745~~ "RVF"			
	Total may be reduced to $205,745 / XX"			

The President of Shamrock did not change any of the unit prices, or extended prices in the bid, but he did initial the new bid ("RVF"). Consequently, the above prices did not agree with the altered price of $205,745.

The IFB provided that award should be made in the aggregate. Shamrock's bid of $205,745 was the lowest bid. The contracting officer, however, decided that the bid must be rejected as nonresponsive, on the grounds that the unit price intended was not definite, and the use of the words "may be reduced" created doubt as to the bidder's intent. He further indicated that payments cannot be determined, since the contractor is to be paid the unit price multiplied by the number of units ordered by the Government.

The second low bid was submitted by Gerald A. Martin LTD., which bid $288.57 per unit for item 0001, and $10.00 per

unit for item 0002, for a total price of $208,999. Thus, Shamrock's total bid is lower than Martin's, but the original unit prices are higher.

GAO evaluated this case on two issues; whether Shamrock's bid can be considered responsive to the material needs of the IFB, and whether this bid can be evaluated on an equal basis with all others. The following excerpt from the protest hearing is pertinent:

> Shamrock's bid imposes no conditions and is not ambiguous or subject to doubt as to its intent to be legally bound to perform in accordance with the IFB. The language of Shamrock's bid reasonably can be interpreted only as offering a total price of $205,745.... The specifications in the IFB clearly state that removal and installation of the garage doors are not to occur, one without the other. The specific unit price for each door removed and installed, can be determined by dividing 700 units (estimated quantity) into the total price of $205,745, resulting in a unit price of $293.92.

GAO further states that allocation of the $15,000 reduction between items 0001 and 0002 is immaterial, since both actions are required in consonance with each other. As such, evaluation of Shamrock's award can be made, equitably with the others, on a unit price basis of $293.92 and total price of $205,745. [19] Shamrock's bid stated that the "total may be reduced to $205,745.00/XX, the amount of $220,745 was crossed out, and the change was initiated (RVF) by the bidder." In changing the total price, Shamrock manifested the intention to reduce the unit price of item 0001 and/or item 0002.

> We have previously indicated that if a bidder included "in the bid some reference, however worded, to show that the amount stated as the total was knowingly and purposely different from the mathematical total of the two bid items" the bid would not be ambiguous. Shamrock's action meets that requirement, and therefore is not ambiguous. [20]

GAO goes on to say that Shamrock's intent was not unclear. The act of crossing out the $220,745 amount, and replacing it with $205,745, clearly showed the intent to reduce the price by $15,000. Any other interpretation, under the circumstances, would be unreasonable.

h. In the instance where contract award is to be made on the basis of total price for performance of various items in the solicitation, failure of a bidder to change unit and extended prices, when a new total price is submitted, does not render the bid nonresponsive. Also, since it is the purpose of a Government contract to obtain acceptable goods or services at the lowest possible price, contracting personnel should not apply technicalities to the bid evaluation process which inhibit this basic requirement. Overemphasis by the contracting agency on ambiguity of unit prices, was an unnecessary action, not conducive to the best interests of the Government or to the maintenance of competition.

i. The contracting agency was clearly in error, by determining Shamrock's bid to be nonresponsive. Adherence to a strict interpretation of unambiguous unit prices, when the award was to be made on the basis of total price, does not follow the precepts of prudent business practices. The end result would have been for the Government to pay a higher price for the service, than was necessary.

j. GAO recommended that the bid of Shamrock be considered on the basis of the changed prices. (Recommendation 8)

4. Case 2. B-178701, July 15, 1975, 55 Comp Gen 97

a. Award protest

b. Invitation for Bids (IFB)

c. Dyneteria Inc.

d. Provide full food services at Lowry AFB

e. Contract Management Division, Lowry AFB

f. Wage Rate Determinations (2)

g. Dyneteria protests the upward adjustment of the contract price awarded to Tombs and Sons, Inc. of $137,214. The Air Force made this adjustment, after award, based on new rate determination published by the Department of Labor (DOL). The IFB had been issued April 30, 1974, quoting hourly wage rates from $2.35 to $4.54 under the Service Contract Act (SCA) wage determination 73-311 (REV. 2). New rates were published under Revision 3 on May 16, 1974, increasing the range from $2.57 to $4.97. The contract was subsequently awarded to Tombs, on August 13.

Incorporation of the new wage rates established after bid opening but prior to award into the awarded contract, was clearly unfair to the other bidders, and not in the Government's best interest.

h. When a contract is awarded on the basis of old wage rates and a new SCA wage determination has been received after bid opening, further contract options should not be exercised, since the proper way to determine the effect of the new wages is to recompete. The assumption that the new wage rates will affect all bidders equally, is fallacious.

i. The contracting agency determination to incorporate the provision of the new wage determination, after contract award, was in error. DAR allows two options; award under the earlier wage rates, or resolicitation under the new wage rates.

j. GAO recommended that no further options with Tombs be exercised, since the firm term of the contract was already completed, and that the requirement be competitively resolicited, utilizing the new wage rates. (Recommendations 2 and 5)

DAR provides that the contracting officer need not incorporate into the solicitation, wage rates issued less than 10 days before bid opening, but he may, in the proper circumstances, resolicit utilizing new wage rates issued after bid opening. [38:12-1005.3(A)(II)]

GAO ruled against the Air Force as follows:

> If the collective bargaining agreement rates did not have to be incorporated into the contract, we see no basis for contract modification; if the CBA rates had to be incorporated, they were available well before award and the IFB should have been cancelled and a new IFB issued with the CBA rates.
>
> The rule that the contract awarded should be the contract advertised is well established. [34] Competition is not served by assuming that the new wage rates will affect all bidders equally..... It is possible that the contract, as amended, no longer represents the most favorable prices to the Government. Speculation as to the effect of a change in the specifications, including a new wage determination, is dangerous, and should be avoided where possible. [14] The proper way to determine such effect is to compete the procurement under the new rates.

5. Case 3a. B-184227, March 9, 1976

a. Solicitation protest

b. Invitation for Bids (IFB)

c. Engineering Handling Systems and Litton Unit Handling Systems

d. Supply of a Mechanized Materials Handling System

e. Marine Corps, Purchasing and Contracting Branch, Camp Lejeune, North Carolina

f. Technical - restrictive specifications (3a.)

g. Engineering Handling Systems (EHS) and Litton Unit Handling Systems (LITTON) protested IFB No. M67001-B-0034 issued by the Purchasing and Contracting Branch, Camp Lejeune, alleging that the specifications were unduly restrictive of competition, in that they were predicated directly upon the design criteria set forth in the descriptive literature of Rapistan, Inc., thus giving Rapistan's authorized distributor, Paul H. Werres Company, a competitive advantage.

The essence of the protests lies in the number, and placement of motors within the required Material Handling System (MHS). The drawings incorporated within the IFB clearly indicated 26 motor locations, 7 of which were considered unnecessary by the protestors.

The Marine Corps, when questioned by GAO, indicated that "it was amenable to any number of motors, so long as operation and performance of the system was satisfactory."

A review of the solicitation did not, however, corroborate the agency position. Section 2.0 entitled "General requirements" references both the drawings and the subsequent narrative specifications. Section 2.1 states that "the equipment for the receiving system shall be in strict accordance

with the requirements, herein specified." Section 2.2 states that "the contractor shall accurately lay out his work according to the drawings and be responsible for the correct location of the equipment." In view thereof, GAO concluded that the solicitation required the number of motors and in the locations set out by the incorporated drawings.

GAO findings were as follows:

> If we are to accept the agency's position that other narrative sections of the specifications may be interpreted to leave the number and location of motors to the contractor's discretion, then we must conclude that the latter are at variance and in conflict with section 2.2, resulting in an ambiguity as to that which is required. Moreover, we would consider such ambiguity to be material since the submissions by Litton and EHS indicate that the number of motors and their concomitant requirements for starters, wiring, etc., would affect the cost of the item and presumably, bid prices.

h. Specification provisions which over-state agencies' minimum needs and which, if agency interpretations were accepted, would create material specification ambiguity, do not permit full and free competition.

i. The contracting agency, admittedly, overstated its requirements in the IFB, by utilizing design specifications presented as a drawing. The drawing limited competition, and was unnecessary to the solicitation. The wording within the solicitation made the drawing specifications binding upon bidders, and rendered agency statements that performance of the system was the prime requirement, as inconsistent. The agency's inconsistency, in turn, rendered the solicitation to be ambiguous.

j. Since neither protestor had bid on the solicitation, GAO determined that neither had been prejudiced, and that termination of the existing contract was not in the Government's best interest. No action was taken on the existing contract, but the defects noted herein were forwarded to the Secretary of the Navy for elimination in future procurements. (Recommendation 4)

6. Case 3b. B-187031, January 4, 1977

a. Protest of award

b. Invitation for Bids (IFB)

c. Nordham Division of R. H. Siegfried, Inc.

d. Construct electronic equipment shelters

e. Headquarters, U. S. Marine Corps, Washington, D.C.

f. Technical - improper data submitted by bidder (3b.)

g. Nordham protested the rejection of its bid and subsequent award to Craig Systems Corporation in relation to IFB M00681-76-B-0049, issued on March 23, 1976, by the U. S. Marine Corps.

The solicitation had specified that the roof, floor, end, sides and door panels of the shelters were to be "a lamination of foamed plastic, bonded between aluminum alloy skins." During a pre-award survey, conducted on June 16 and 17, 1976, Nordham proposed addition of a honeycomb coring to the foam plastic, to a member of the survey team. The team member suggested that Nordham submit this proposal, in writing, to the contracting officer. Nordham did so, stating that it had decided to utilize honeycomb core and a hot bond system,

in conjunction with foam that has been pressed into the core. Nordham further stated that its decision was in compliance with the solicitation's specifications.

Subsequently, the same survey team member, mentioned above, advised the contracting officer that, "Nordham's proposal can be considered as nonresponsive." On the basis of this advice, and the letter, the contracting officer rejected Nordham's bid, which was the lowest, as nonresponsive. He subsequently awarded to the second low bidder, Craig, on July 6. On July 20, Nordham forwarded another letter to the contracting officer stating that it had also advised the survey team that it was prepared to perform the contract by constructing the shelters, either with or without the honeycomb core, but preferred to use it.

Craig, upon hearing of Nordham's protest, agreed to suspend work, as it had incurred little or no costs in performance of the contract.

The Marine Corps, in responding to the protest allegations, decided that Nordham's bid was, in fact, responsive, and that it had acted erroneously in rejecting the bid.

GAO, in amplifying the Marine Corps response, stated:

> We see no basis to disagree with the Marine Corps' present position that had it accepted Nordham's bid as submitted, the bidder would effectively have been bound to perform in accordance with the advertised terms of the solicitation, which do not provide for the use of a honeycomb core. [24]

h. Bids should not be rejected as nonresponsive merely because they offer an alternative approach to the terms of the solicitation, since the Government's acceptance

of a bid as submitted effectively binds the bidder to perform in accordance with the advertised terms of the solicitation. The alternative approach offered in no way indicates that the bidder has misunderstood the solicitation specifications.

i. The contracting agency was, admittedly, in error by rejecting the perfectly acceptable Nordham bid. Additionally, the survey member was inconsistent and greatly in error by his implications to the contractor that the honeycomb core should be incorporated into its proposal, and his apparent reversal in subsequently advising the contracting officer that Nordham's bid should be considered nonresponsive.

j. In view of the suspension of performance, and the representation made by Craig concerning performance costs to date, GAO recommended that the contract with Craig be terminated for the convenience of the Government and the award be made to the low bidder and protestor, Nordham. (Recommendations 1 and 3)

7. Case 4. B-188026, April 29, 1977

a. Award protest

b. Invitation for Bids (IFB)

c. Sillco, Inc.

d. Packing, Crating and Drayage services

e. U. S. Army Field Artillery Center (USAFAC), Fort Sill, Oklahoma

f. Legal - I.C.C. licensing arrangements (4)

g. Sillco protested any award to Chevalley Moving and Storage of Lawton, Oklahoma, because Chevalley was not licensed in its own name by the Interstate Commerce Commission (I.C.C.) to perform services specified in the solicitation.

The contracting agency had determined Chevalley to be the low bidder, and that the IFB did not require a bidder to possess ICC operating authority in its own name. Since Chevalley of Lawton had an agency agreement to move household goods under its parent company's license, the contracting officer determined it to be a responsive bidder under the terms of the IFB.

GAO, as a general rule, does not review responsibility determinations unless fraud is shown on the part of procuring officials, or the solicitation contains definitive responsibility criteria, which have not been applied. [28] A specific requirement for a federal license is such a definitive responsibility criterion, and compliance therewith is a matter reviewable by GAO.

In a previous decision, GAO had held:

> Where an invitation requires a bidder to have ICC operating authority, but does not specifically require the bidder to possess such authority in its own name, the bidder need not possess such authority in its own name to be eligible for contract award. [17]

As such, the contracting officer's decision was correct and consistent with the previous GAO determination.

However, subsequent to the contracting officer's determination, the ICC has held in its recent Bud's Moving and Storage, Inc. decision:

> The performance of incidental transportation in connection with pack and crate service by a local uncertified agent 'using' its Van Line principal's authority to be a clear violation of the law. We interpret the Interstate Commerce Act as requiring a contractor on a Government containerization contract, actually performing the transportation service, to hold in its own name either section 206 or 209 operating authority as a motor common or contract carrier. An uncertified agent may not 'use' or 'lease' the operating authority of its principal to perform the Drayage service. In so deciding, we make no distinction between an agent simply listing its principal's ICC motor carrier operating number in the bid and elaborate subcontracting lease-back arrangement employed by petitioner. [41]

GAO, having taken into consideration the above decision, presented its views as follows:

> Since Chevalley of Lawton, a separate and distinct legal entity, has an agency agreement with the parent Chevalley firm and it was on this basis that the contracting officer determined Chevalley of Lawton to be responsible, the Bud's decision would appear to be applicable here. On the other hand, the ICC in Bud's was not concerned with parent/subsidiary corporate relationships; it was faced with a solicitation where a local carrier was an agent for and subcontracted work to a major Van Line authorized to operate as a motor carrier throughout most of the country. It may be, therefore, that the ICC would view the Chevalley arrangement as a permissible one. However, there is nothing in the record to indicate that this aspect of the situation has been considered by the contracting officer or that Chevalley has undertaken to ascertain an ICC position on the matter.

h. In light of the recent ICC Bud decision, no one is in error, or to be blamed for the situation herein subscribed. It does, however, behoove the agent contractor, Chevalley of Lawton, and the contracting officer to determine the exact interpretation of the Bud's decision as it applies in this case.

i. Not applicable

j. GAO recommended that the contracting agency reconsider the responsibility determination, taking into account the holding in the Bud's decision, and whether or not this decision applies to the Chevalley corporate arrangement. (Recommendation 6)

8. Case 5a. B-183438, June 2, 1975, 54 Comp Gen 999

a. Bid protest

b. Invitation for Bids (FB)

c. Hydro Fitting Manufacturing Corporation

d. Supply of Federal Stock Classification 4370 material

e. Defense Construction Supply Center (DCSC), Columbus, Ohio

f. Improper handling of bids by the Government - Internal (5a.)

g. Hydro Fitting Manufacturing Corporation protests the rejection of its bid on IFB No. DSA700-75-B-1579 issued by DCSC on February 5, 1975.

At 4:45 P.M. on February 28, 1975, Hydro transmitted a telegraphic bid to DCSC. The telegram was acknowledged by the DCSC automatic "reply back" system. This acknowledgement appears at the beginning (proper hook-up) and end (receipt) of Hydro's copy of the telegram. Additionally, on March 6, 1975, Hydro mailed a copy of the February 28 telex to DCSC. This copy was received by DCSC on 10 March, and was confirmed as the purported Hydro telex.

Bid opening, however had occurred at 10:30 A.M. on 5 March; seven bids had been received and opened, but Hydro's was not among them.

Upon learning that its telegraphic bid had not been considered, Hydro inquiried DCSC as to the reason. The agency's investigation revealed that the digital branch had no record of the telegraphic bid, but that the telex machine had been out of order from 3:30 P.M. until midnight on February 28. This occurred because the machine ran out of paper, and the tape had jammed, but acknowledgement of incoming messages continued.

DCSC did not dispute Hydro's contentions, but refused to consider its bid anyway, quoting previous GAO decisions, and DAR, as authority. The previous GAO decisions had concluded that receipts for certified mail purported to have contained bids, but which were never opened, were not ample evidence to allow resubmission of bids after bid opening. [11] DAR states that:

> Any bid received at the office designated in the solicitation after the exact time specified for receipt will not be considered unless it is received before award is made, and it was sent by mail (or telegram if authorized) and it is determined by the Government after receipt at the Government installation.
>
> The only acceptable evidence to establish the time of receipt at the Government installation is the time/date stamp of such installation on the bid wrapper or other documentary evidence of receipt maintained by the installation.

DCSC has stated that:

> Since receipt of the telegraphic bid in question cannot be established by the time/date stamp or other documentary evidence maintained at this center, the telegraphic bid does not qualify for consideration under clause C39 (of the IFB, which merely restates the DAR clauses, above).

GAO, in disagreeing with the agency, took the position that while clear evidence of time of receipt is nonexistent in this case, evidence of Government mishandling which would permit acceptance of a late bid is overwhelming. Hydro had produced an acknowledged copy of its telegraphic bid, with time of transmission at the bottom of the message, thus substantiating time and date of receipt. Moreover, the authenticity question is substantiated by the fact that the confirming copy was mailed prior to the time that Hydro could have known of the telex malfunction. The only possible conclusion, given these circumstances, was that the bid was not timely considered for award purposes, due solely to Government mishandling within the spirit and intent of the late bid regulation. No bidder, including Hydro, was competitively prejudiced by this decision.

h. Overly strict interpretation of regulations for the purpose of covering up internal agency errors does not serve the public interest. Such practices in the contracting community are potentially destructive of projected good will, the maintenance of fair competition, and the integrity of the contracting mechanism.

i. The contracting agency clearly mishandled Hydro's bid. More importantly, it refused to admit this error by emphasizing an unfair interpretation of the regulations, in the strictest sense. The best interests of the Government and the competitive system are not well served by such narrow interpretations.

j. GAO recommended that Hydro's bid should be considered for award. (Recommendation 8)

9. Case 5b. B-188665, June 22, 1977, 56 Com Gen 737

a. Bid protest

b. Invitation for Bids (IFB)

c. Federal Contracting Corporation

d. Provide Medical Supplies

e. Fitzsimmons Army Medical Center (FAMC)

f. Improper handling of bids by the Government - Postal (5b.)

g. Federal Contracting Corporation protested the rejection of its bid, as untimely, by FAMC under IFB DADA03-77-B-0488, issued February 18, 1977.

Federal's bid was received by the Aurora, Colorado Post Office at 5 P.M. on Saturday, March 19, 1977, annotated, "special delivery" and "certified mail." It was not delivered to the FAMC Post Office until 10 A.M. on 21 March (Monday). It was held for delivery until 2:30 P.M., at which time the Army Postal personnel picked it up for delivery to FAMC. It was subsequently receipted for, by hand, at 2:40 P.M., and delivered to the Procuring Contracting Officer at 2:50 P.M.

Bids had been opened at 2 P.M., and Federal's bid was determined to be untimely, per timely bid procedures specified in DAR.

Federal contended that FAMC prevented timely delivery of its bid by refusing to accept special delivery mail on the weekends.

GAO determined Federal's contention to be true, and a previous GAO determination applies to this case:

> We held that a bid should be considered for award where the post office attempted delivery of an Air-Mail special delivery bid on Sunday, the day before bid opening, and instructions at the Government installation precluded guards from accepting mail so that the post office had to redeliver the bid the next day and failed to do so until after bid opening. This decision is controlling here. [10]

In applying the above precedent to this case, GAO continues:

> We note particularly that P & C personnel placed passive reliance on the postal service to timely deliver bids for a Monday bid opening after a weekend when delivery of such mail was made impossible by FAMC and when the normal course of delivery might well be expected to be delayed due to mail buildup over the weekend. In these circumstances, we think that FAMC personnel were, at the least, obligated to make timely inquiry of the USPS regarding the possibility of additional bids. No such action was taken. We consider the agency's conduct in these circumstances to fall short of the standard required for the effective establishment of and implementation of procedures for the receipt of bids and regard such failure as the paramount cause of delay.

h. In instances where an agency's policy is not to accept special delivery mail on the weekends, and bid openings are scheduled early in the week, particularly on Monday, it is unacceptable for the contracting personnel to place passive reliance upon routine mail deliveries, to insure timely receipt of bids. Mail buildup during weekends is a very common occurrence, and special care must be taken to insure that late bids are not the result of carelessly executed procedures in the contracting agency.

i. The policy of FAMC, not to accept special delivery mail on the weekends, was questionable, and had a very negative effect on the flow of mailed bids to P & C early in the work week.

Given the FAMC policy, however, it was incumbent upon the contracting officer to circumvent the normal mail flow, in order to prevent the late bids. It is apparent from the narrative that no thought was given to requesting a change in the FAMC mail policy, or to implementing a special policy just for P & C. This lack of planning and implementation by the contracting officer reflects very negatively upon his judgement.

j. GAO strongly urged a change in FAMC's P & C mail pick up procedures. Their recommendation which impacted on the case at hand, was that Federal's bid should be considered for the award. (Recommendation 8)

10. Case 5c. B-185715, May 4, 1976, 55 Comp Gen 1066

a. Protest of award

b. Request for Proposals (RFP)

c. T M Systems, Inc. (TM)

d. Supply of measuring instruments

e. Navy Regional Contracting Office (NRCO), Philadelphia, Pennsylvania.

f. Improper handling of bids - disclosure of information (5c.)

g. T M Systems, Inc. (TM) protested against the proposed award of a contract to Vogue Instrument Corporation (Vogue), under RFP N00140-76-R-0503, issued by NRCO, Philadelphia. TM contended that in conjunction with a previous release of information of its bid price, the Navy had failed to inform TM that Vogue had alleged a pricing mistake in its

initial proposal, and had requested that its initial proposal price be corrected downward, to an amount lower than TM's initial price. The essence of TM's protest was that Vogue had been given a competitive advantage, as a result of the contracting agency's error.

On December 10, 1975, both TM and Vogue submitted proposals, priced as follows: TM....$198,000.00; Vogue.... $212,832.70. Price was the determining factor in this acquisition, and both offers were considered acceptable. On December 11, 1975, the contracting officer erroneously released TM's unit and total prices to Vogue.

Shortly after this occurrence, Vogue alleged to have made a pricing mistake in its proposal, and requested that its proposal price be corrected to an amount lower than TM's initial price. Vogue further alleged that the pricing mistake was completely unrelated to the disclosure of TM's price.

The contracting officer realized that he had a serious problem, and he opted for making a full disclosure of the prices submitted by both offerors in their initial proposals to both parties, in order to overcome the competitive advantage which he had given to Vogue.

On December 31, 1975, TM and Vogue were informed of the Navy's intention to solicit best and final offers. Both TM's and Vogue's unit and total prices were released with this announcement. Each of them responded to the request. Both proposals were approximately 10% lower than the previous low bid, and Vogue's bid was the lowest. TM subsequently filed

its protest to GAO on January 14, 1976, and in the U. S. District Court, seeking a temporary restraining order on April 5, 1976.

GAO pointed out that even though the release of TM's prices was in error, it was unintentional. Additionally, it was ruled that the contracting officer's decision to proceed as he did, was essentially correct, even though certain aspects of an "auction" type technique are contained within this procedure.

GAO, in emphasizing the essence of this protest, states, as follows:

> As indicated previously, where best and final offers are sought in a case of this kind, the contracting agency must attempt to equalize the competition and eliminate insofar as possible any offeror's unfair competitive advantage. We believe the Navy's failure to advise TM of Vogue's mistake in proposal claim did place TM in a less than equal competitive position. This conclusion does not depend on Vogue's motivation for alleging a pricing mistake in its proposal, whether the mistake could be substantiated, or whether the allegation of mistake should have been rejected as a late modification to Vogue's initial proposal. The salient fact is simply that Vogue indicated its willingness to accept an award at a price below its initial proposal price and TM's initial proposal price, and that TM, in preparing its best and final offer, was unaware of this fact. We believe this is a sufficient degree of inequality in the competition to warrant corrective action.

h. Where information in the initial proposal has been improperly disclosed, and award cannot be made on the basis of initial proposals (in this case, because initial proposals were not considered to be fair and reasonable--the Governmental estimate was $134,000), conduct of negotiations, and submission of best and final offers should be undertaken in

such manner to reinstitute equally competitive positions for both offerors.

i. The contracting officer was initially at fault by his disclosure of TM's prices. His attempts to overcome this mistake were considered to be correct, with the exception that the bid price change of Vogue should have been relayed to TM in order that Vogue would not be given an unfair advantage.

j. GAO recommended that the Navy obtain permission from Vogue to release the mistake in its proposal claim, and to make it a condition of Vogue's continued participation in the acquisition. If Vogue refused, then the award should be made to TM. (Recommendation 3) If Vogue agreed, then the Navy should release the information to TM, and after a reasonable time, obtain another round of best and final offers, and proceed with the award. (Recommendation 9)

11. Case 6. B-184672, August 23, 1976

a. Protest of award

b. Invitation for Bids (IFB)

c. Davis Walker Corporation

d. Supply of steel wire under NSN 9505-00-596-9648

e. Defense Industrial Supply Center (DISC), Philadelphia, Pennsylvania.

f. Violation of the Buy American Act. (6)

g. Davis Walker Corporation (Davis) has protested the award of a contract to the R. H. Pines Corporation, under IFB DSA500-75B-2427, issued by DISC, on the grounds that the steel wire offered by Pines should have been evaluated as a

foreign source end product under the Buy American Act, 41 U.S.C. 10A-D (1970).

R. H. Pines Corporation represented itself to the contracting agency as a regular dealer, and indicated that the supplies which it offered would be manufactured by the Titan Steel and Wire Co. (TITAN), of British Columbia, Canada. Canadian end products are evaluated on an equal basis with U.S. end products. DAR states that:

> "Canadian end products" means an unmanufactured end product mined or produced in Canada, or an end product manufactured in Canada if the cost of its components which are mined, produced, or manufactured in Canada or the United States exceeds 50 percent of the cost of all its components. The cost of components shall include transportation costs to the place of incorporation into the end product. [38:6-103.5(A)]

Davis contended that galvanized wire is a manufactured product, and that the basic components of such wire are steel rod and zinc coating, regardless of the procedures used in producing the end product. As such, the end product from Titan should have been considered as containing more than 50 percent foreign made components, and the differential specified in the Buy American Act should have been applied to Pine's bid.

Pines, in reply to the protest, indicated that the main component of the galvanized end-product wire is bright wire, which is manufactured in Canada (from Japanese steel). Pines claims that the manufacture of bright wire changes the characteristics of the steel rod, thus indicating that all the components of the galvanized wire, which is made up of wire and zinc, are either mined or produced in Canada.

The contracting officer agreed that bright wire was the basic component, and awarded the contract to Pines on July 26, 1975.

GAO in reviewing this case, noted that DAR guidance is not clear with respect to this dispute:

> Whether the manufacture of the galvanized wire from the steel rods is traditionally performed in one or two stages is in dispute. If the manufacture of the wire is traditionally performed in one continuous stage, as Walker contends, then the source of the steel rod must be considered to determine whether the end product should have been evaluated as foreign under the Buy American Act, 41 U.S.C. 10A-D (1970).
>
> In the present situation we cannot say that the contracting officer's conclusion was incorrect. However, we believe this case illustrates the need for guidance in defining the term "manufacture" as used in the Buy American Act so that procuring agencies will be able to insure that only domestic source end products are acquired for public use.

h. Determination of whether or not to apply the Buy American Act requires clarification in the case where foreign made components are processed through more than one manufacturing stage. More precise guidance from the Acquisition and Contracting regulations is required with respect to this subject.

i. The only fault to be identified herein lies within the meaning of the term "manufacture" as specified in the DAR. More precise guidance must be given with respect to the definition of this term, so that consistent determinations in the use of the Buy American Act can be made.

j. GAO recommended that the applicable Governmental acquisition regulations (FPR and DAR) be more precisely defined with respect to the term "manufacture," as used in the

context of the Buy American Act. No exception was taken with respect to the award. (Recommendation 4)

12. Case 7. B-183275, November 4, 1975

a. Solicitation protest

b. Invitation for Bids (IFB)

c. Acurex Corporation

d. Supply of torsionmeters and associated repair parts

e. Naval Sea Systems Command, Washington, D.C.

f. Improper evaluation due to technical considerations (7)

g. Acurex Corporation protested against the Invitation for Bids N00024-75-B-4254, issued by the Naval Sea Systems Command (NAVSEA) on December 20, 1974, as a small business set-aside. Acurex contends that the IFB unduly restricts competition, because the method of stress measurement defined in the IFB is unnecessary to the requirements of the solicitation.

Acurex manufactures a torsionmeter which measures stress by the use of an electronic sensor fitted between two collars on a rotating propeller shaft. The IFB calls for magnetostriction measuring technique which involves measuring changes which may occur in the magnetic properties of the shaft as it rotates. Both types of instrument perform essentially the same function.

The Navy desires the magnetostrictive equipment because it claims that the Acurex torsionmeter does not provide for the required safety factors. In a study conducted by both the Navy and the Massachusetts Institute of Technology, each determined that the knife edge blades of the Acurex

design, themselves, stressed the shafts beyond acceptable levels. This study was based upon a clamping pressure of 16,000 PSI.

Acurex stated that the clamping pressure of 16,000 PSI was not to be utilized on all classes of ships, and took exception therefore, to the results of the study. The Navy awarded the contract to Mechanical Technology Incorporated (MTI) on August 6, 1975.

GAO did not rule on the matter of whether or not the specifications reflect the minimum needs of the service, as this determination can only be made by the procuring agency. [27]

GAO did, however, determine that the Navy foreclosed Acurex' bid on the basis of an erroneous assumption (use of 16,000 PSI clamping pressure), and that the procurement may have been unduly restrictive of competition.

h. Where the protestor claims unduly restrictive specifications, which are based upon a study limited by erroneous assumptions, further review of these specifications and resolicitation, in light of a determination that they are, in fact, unduly restrictive, is required.

i. The contracting agency, in accepting a study based upon an erroneous assumption, is at fault in this case.

j. GAO recommended that further testing of the Acurex design be completed. In the case where the safety factors in the IFB were validated, the award to MTI would not have been disturbed.

If, however, further study resulted in a finding of unduly restrictive specifications in the existing IFB, the present contract would have to be cancelled and resolicited. (Recommendations 1 and 2)

13. Case 8a. B-187968, September 28, 1977, 56 Com Gen 1005

a. Protest of award

b. Basic Ordering Agreement (BOA)

c. D. Moody and Company, Inc.

d. Supply of Aviation parts

e. U. S. Army Aviation Systems Command

f. Improper application of regulations - BOA (8a)

g. D. Moody and Co. (Moody) protested the acquisition policies and procedures employed by the United States Army Aviation Systems Command, in placing delivery order No. 3285 under Basic Ordering Agreement (BOA) DAAJ01-71-A-0303 with Sikorsky Aircraft, Division of United Technologies Corp. Moody contended that it had been wrongfully excluded from the competition in two ways: (1) Award before publication in the Commerce Business Daily (CBD) precluded Moody from submitting a bid, and (2) sole-source acquisition under the BOA avoided competition from surplus dealers. Moody contended its surplus parts to be new, unused, and non-deteriorable parts manufactured by Sikorsky, and carrying the same part number as those ordered under the BOA.

The Army expressed concern that parts from a surplus dealer would not be acceptable, and cited DAR as the authority for excluding Moody from the competition.

The negotiation authority for the sole-source procurement was Title 10 U.S.C. (10) which permits negotiation "for property or services for which it is impracticable to obtain competition." [38:3-210.2(A)(10)]

The determination and finding supporting the negotiation authority stated that the spare parts could only be identified by manufacturer's part number, since design data available was incomplete to permit advertised bidding.

GAO viewed this determination as unmeritorious. Since the parts in question were required under MIL-STD-1008, it was not possible that Sikorsky part numbers, offered by Moody, would be in variance with part numbers offered by Sikorsky.

The real issue which the Army was attempting to address was their concern over quality control. GAO shared this concern, as the following excerpt indicates:

> The Army's real concern appears to be over accepting surplus property without being capable of inspecting the parts so as to insure quality and conformance. The case at hand is somewhat unique. Here, Moody can offer a new, unused, nondeteriorable part from Sikorsky, identified by the same part number. While the Army has a legitimate concern relative to what, where, when, why, and how an item became surplus, such concern without more, is not sufficient to preclude procurement of surplus parts from surplus dealers. With regard to the effect which limited data rights bear on inspection, Sikorsky is required by the BOA to establish and maintain a quality control program to assure adequate quality throughout all stages of manufacture. Sikorsky is also required to maintain records of all inspection work. The Navy has the responsibility to assure that Sikorsky's quality control program meets the requirements. The Navy's inspection, in accordance with NAVAIR Field Administration manual 4330.16, includes spot checking the product, auditing inspection records and visual checking of the manufacturing process. The Navy does not inspect an item after delivery from Sikorsky, although a limited

visual inspection is made by field maintenance personnel prior to installation. Accordingly, the only distinction between surplus parts from Moody's shelves, as opposed to Sikorsky's, is the necessity to update the historical data on the item since it left Sikorsky's plant. Once this data has been supplied, there is no distinction. Here, the part Moody would offer was purchased from the Government as surplus. Therefore, the part has passed all the inspection procedures the Army alleges must be performed prior to acceptance of the item.

Therefore, surplus dealers cannot be automatically eliminated by simply opting for a sole-source determination under exception 10. But, the question of whether or not use of the BOA is acceptable in this case is an entirely different matter which GAO clarified:

> Based on the information the Army had at the time the order was placed, the determination that it was impracticable to obtain competition was reasonable. It would be overly burdensome on the procurement system to require the procurement activity to ascertain in every instance the existence of a surplus dealer (assuming surplus parts were acceptable) before using a BOA. Such a procedure would contravene the very purpose of the BOA. [38:3-410.2B]

And, finally, addressing the issue of the late BOA synopsis in the CBD, GAO references the provisions of DAR, as follows:

> (c) Limitations
> (1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition. [38:3-410(C)(1)]
>
> Timely synopsis is required so as to allow potential bidders an opportunity to compete. The publishing of a fait accompli does not allow alternate sources to bring their existence to the attention of the Government. [38:1003.2]

h. Three lessons learned were established from this case: (1) BOA's cannot be used to exclude surplus spare

parts dealers, once the contracting agency has been made aware of the potential source of supply, especially when surplus parts are acceptable from the item manufacturer. (2) While the Government may not have adequate data rights in parts to obtain competition from other manufacturers, the part number is sufficient, of itself, to acquire the part from either the manufacturer or surplus parts dealers. (3) Publication of a synopsis in the Commerce Business Daily must precede ordering under BOA procedures, so as to allow potential bidders an opportunity to compete.

i. The Army contracting agency was in error through its late synopsis of the associated BOA in the CBD, thus restricting competition. Additionally, the sole-source determination was unfounded, and based upon erroneous assumptions, which have been identified in the narrative. This mistake would not have been committed if a proper synopsis had appeared in the CBD prior to placing the order, because any potential bidders would have been identified, and use of the BOA would have been prohibited.

j. GAO recommended that in the future, the BOA synopsis should be published in the CBD in timely fashion, but in this case, since the orders under question had been substantially completed, the order should not be disturbed. (Recommendation 4)

14. Case 8b. B-186501, February 2, 1977

a. Award protest

b. Request for Proposals (RFP)

c. Control Data Corporation

d. Supply of Disc Packs for a Univac U-1050-II Computer System

e. Warner Robbins AFB, Georgia

f. Improper application of regulations - GSA cognizance (8b)

g. Control Data Corporation (CDC) protested the award of a contract to Sperry Rand Corporation, under RFP F09603-76-D-4413, issued by the Contract Division at Warner Robbins AFB. The award was made on March 25, 1976. Under the terms of the contract, an initial order for the purchase of 290 disc packs, at a total price of $221,560, was issued. The exercise of further options could increase the quantity to 575.

CDC protested on three grounds: (1) Violation of Federal Property Management Regulations (FPMR), by not obtaining GSA delegation of procurement authority (DPA), (2) the Air Force determination to negotiate on a sole-source basis pursuant to 10 U.S.C. 2304(A) (10) was not well founded, and (3) an earlier amendment of a Univac contract which the Air Force relied upon in part to support the sole-source determination was not justified and was improper.

GAO concluded that since the procurement had not been authorized by GSA, and a DPA was not issued, the other contentions need not be considered.

Essentially, the protest centers on the issue whether disc packs are ADP equipments (ADPE), or supplies.

The following excerpt from FPMR is very apt:

Restriction on sole-source procurements

> Sole-source procurement of ADPE in excess of $50,000 over the system's life by either lease or purchase is permitted only after delegation of procurement authority (DPA) is provided by GSA. Where a sole-source procurement appears to be in the best interest of the Government, agencies shall submit to GSA a request for a DPA accompanied by a statement or determination and finding justifying the requested action. [32:101-32.403.5]

The Air Force claims that disc packs are supplies, and cites AFM 300-6 and DOD Directive 5100.40 as the authority for this claim. They further state that disc packs are storage media not unlike computer tape and punched cards, which are also supplies.

However, FPMR states:

> Supplies means consumable items designed specifically for use with ADPE, such as computer tape, ribbons, punch cards, and tabulating paper. [32:101-32.402.4]

GSA comments that disc packs differ from computer tape in the method of transport, which results in minimal wear when compared to computer tape. Additionally, industry practice is to lease disc packs and to sell computer tape, giving further credence to the premise that disc packs are ADPE. Further, discs are classified under FSC 7025, ADP I/O and storage devices, while magnetic tape is listed under FSC 7045, ADP supplies and support equipment.

In a previous decision, GAO had ruled that disc packs were considered by FPMR to be ADPE. [31] In support of GSA and FPMR, GAO, in this case, ruled that the Air Force decision was improper:

> Having regard for the fact that disc packs are not "consumable items" as required by the FPMR definition for supplies, that it has been our previous understanding that disc packs are ADPE; and that the view of GSA, which is entitled to significant weight because of its statutory responsibility and authority for Government ADPE procurement, is that the disc packs are ADPE; we conclude that the Air Force was without authority to proceed with the award without a DPA. Although the DOD directive and AFM support the contracting officer's action, the FPMR, which is binding on all Federal agencies, takes precedence in the matter. [29]

h. Disc packs for use with a computer system are not to be considered as consumable items, but are ADPE, and cannot be acquired on a sole-source basis without delegation of authority from GSA.

i. The Air Force procuring agency was in error by attempting to justify an action by quoting an Air Force Manual and a DOD directive as authority, in the face of conflicting, superceding regulations and interpretations issued at a higher level, and supported by GSA and GAO. It seems apparent that the Air Force was operating in questionable fashion, by their disregard for GAO and GSA's positions, and the Federal regulations clear definition of disc packs as ADPE.

j. Since the initial order had already been completed, GAO recommended that no further orders be placed under the contract. (Recommendation 5)

15. Case 8c. B-181663, March 28, 1975, 54 Comp Gen 809

a. Protest of award

b. Request for Proposals (RFP)

c. Ira Gelber Food Services, Inc.

d. Mess attendant services at NAS Key West, Florida

e. Naval Supply Center, Charleston, S. C.

f. Improper application of regulations - Enlisted Dining Facilities - use of IFB vs. RFP (8c)

g. Ira Gelber Food Services, Inc. (Gelber) protested against the award of a mess attendant services contract to Military Base Management of New Jersey (MBM), under RFP N00612-74-R-0175, issued on April 24, 1975 by NSC, Charleston.

The essence of the Gelber protest was to question the negotiation procedure and procurement method utilized by the Navy. Gelber noted that the Navy had not complied with a previous GAO decision that:

> The Navy should consider formally advertising all future procurements for mess attendant services (as do the Army and the Air Force). [26]

The existing contract was negotiated under 10 U.S.C. section 2304(a)(1). As a total small business set-aside, it gave the Navy the option of using conventional negotiating techniques, or small business restricted advertising, which is essentially an IFB, limited to small business.

The Navy attempted to justify use of the RFP by indicating their lack of confidence in the manhour requirements estimated by Food Service Officers.

Subsequent to the above attempted justification, the Navy reversed its decision, stating that inequitable application by various contracting officers, of the RFP evaluation factors, was key in their reversal. Twenty protests had been submitted on 29 negotiated procurements, by 13 different offerors, in Fiscal Year 1974.

The Navy goes on to say:

Based on our experience with formal advertising this year, and the major problem areas noted above with the negotiation method, it has been determined that procurement of mess attendant services by formal advertising is the method that will result in a more uniform treatment of bidders, in addition to encouraging more realistic competition. Accordingly, all solicitations for these services issued after March 15, 1975, will be formally advertised.

GAO commended the Navy on its change of position, and agreed, in total, with the Navy's new assessment.

h. Total small business set-asides for mess attendant services, pursuant to Exception (1) of the 17 negotiation exceptions listed in the DAR, should be conducted by the process known as small business restricted advertising, since the Navy had failed to show any benefit by being the only service continuing to use negotiation procedures.

i. The contracting agency was in error by refusing to use restricted advertising in lieu of RFP's, in connection with small business set-asides for mess attendant services. In addition, better man-hour projections by Food Service Officers would greatly improve the contracting mechanism by giving contracting personnel better yardsticks with which to measure contractor's offers.

j. GAO recommended that no option be exercised on the present contract with MBM. (Recommendation 5)

16. Case 8d. B-183683, October 9, 1975

a. Protest of award

b. Request for Proposals (RFP)

c. Non-Linear Systems, Inc. and Data Precision Corporation

d. Supply of multimeters

e. U. S. Army Missile Command, Redstone Arsenal, Ala.

f. Improper application of regulations - sole-source determination (8d)

g. Non-Linear Systems Incorporated (N-L) and Data Precision Corporation (DP) protested the proposed award of a contract to the John Fluke Manufacturing Co. (FLUKE), for 149 multimeters, under RFP DAAH01-75-R-0746, issued by the U. S. Army Missile Command (MICOM), April 4, 1975. The award was to be made under the "Public exigency" negotiation Exception (2), as the requirement was assigned a priority designator of 02.

In the April 4 edition of the Commerce Business Daily (CBD), the RFP was announced with the due date of May 1, 1975. Shortly thereafter, Data Precision began its attempts to obtain a copy of the RFP. DP tried unsuccessfully throughout April to get a copy of the RFP, finally receiving one on May 1, 1975. Fluke responded to the solicitation on April 9, and submitted its formal proposal on April 23. On April 18, Non-Linear Systems protested the sole-source solicitation to GAO; on April 30, Data Precision took similar action.

MICOM sought to justify the negotiated sole-source solicitation on grounds that the material was urgently needed; that Fluke could provide an established quality product with which the Army was familiar; that there were no performance specifications required by the multimeter, and no drawings

describing the design of the instrument; that the only description available was a Fluke part number; and that technical data was not available nor forthcoming for use by other manufacturers.

As to DP's unsuccessful attempts to obtain an RFP, MICOM offered no explanation for its refusal to issue one, but noted that DP was not prejudiced by this action.

GAO, while agreeing that a sole-source justification was reasonable, commented that continued restriction of the acquisition was neither necessary nor valid. The basis for this decision was evidence submitted by the protestors, in the following:

> The protestors have submitted evidence to the effect that the Army's requirement is for, and Fluke's item is, a standard off-the-shelf digital multimeter; that 20 or more firms produce off-the-shelf multimeters which will meet or exceed the performance parameters noted above; that there is no need for any technical documentation other than a listing of the salient characteristics of the Fluke model 8000A-01, which have been known to the Army since at least July 1973, and available to the general public in Fluke's published brochures; and the prices for their standard off-the-shelf multimeters, meeting or exceeding the capabilities of the specified Fluke model, are less than that quoted by Fluke. In addition, the 5-month production lead time cited by the contracting officer appears to be of questionable validity.

In fact, GAO determined that 50 such multimeters could be obtained from Fluke within 30-90 days. N-L suggested that competitors of the Fluke model could deliver within 30 days.

Counsel for the Army sought to justify MICOM's action by quoting a previous GAO decision:

> We have also held that where the legitimate needs of the Government can be satisfied from only a single source, the law does not require that those needs be compromised in order to obtain competition. [30]

GAO refuted the Army's contention, in the following excerpt:

> This decision does not justify the actions of MICOM in the instant case. The item involved in the procurement under consideration was one which the protesting company would have to develop. In the instant case, the protesting companies contend that they and other manufacturers could have met the legitimate needs of MICOM for a multimeter without development since an off-the-shelf item is what is required and that is what Fluke is offering and what they would offer.

GAO in further assessing the Army position, quoted yet another previous decision, which is pertinent:

> Neither is the fact that Fluke has provided MICOM with satisfactory multimeters in the past justification for negotiating with only Fluke. This office has held that the fact that an instrument manufactured by one company has proven satisfactory in use is not sufficient basis to exclude others where the evidence indicates that they have the ability to meet the agency's needs. [21]

As to MICOM's refusal to release the RFP to interested parties, DAR explicitly states:

> When a solicitation for proposals has been limited as a result of a determination that only a specified firm or firms possess the capability to meet the requirements of a procurement, requests for proposals shall be mailed or otherwise provided upon request to firms not solicited, but only after advice has been given to the firm making the request as to the reasons for the limited solicitations and the unlikelihood of any other firm being able to qualify for a contract award under the circumstances. [38:1002.1]

GAO, referencing the above DAR clause, stated that MICOM's actions were in violation of the DAR, and excluded Data Precision from the competition.

h. Although priority designation 02 is sufficient authority for contracting officers to negotiate under the public exigency exception, rather than formally advertise, such urgency does not give contracting officers authority to negotiate with only one source, where other sources can meet the agency's needs. Applicable regulations require solicitation of proposals, including price, from a maximum number of qualified sources, consistent with the nature and requirements of supplies to be procured, and the time limitations involved. Additionally, when a sole-source RFP is listed in the Commerce Business Daily, and an interested party is unable to obtain a copy of the solicitation after reasonable efforts to do so, failure of the agency to comply with such a request is a violation of DAR 1-1002.1.

i. The contracting agency was greatly in error on two counts: (1) Restriction of the solicitation to a sole source was not justified and (2) failure to furnish copies of the RFP after publication in the CBD, was a blatant violation of DAR. Both of these actions had the effect of unnecessarily restricting competition, even considering the urgency of requirement. In fact, the requirement could have been satisfied sooner, if it had simply been formally advertised.

j. GAO recommended cancellation of the RFP, and resolicitation on an unrestricted basis. (Recommendation 2)

17. Case 9. B-184662, May 25, 1976

a. Protest of award

b. Invitation for Bids (IFB)

c. United Power and Control Systems, Inc.

d. Supply of 2,500 KVA substations

e. Naval Facilities Engineering Command, Davisville, Rhode Island

f. Improper application of evaluation criteria (9)

g. United Power and Control Systems, Inc. protested the proposed award of any contract, for supply of 2,500 KVA substations, emanating from IFB N62578-75-B-0123, issued by the Naval Facilities Engineering Command, Davisville, Rhode Island, during the month of January 1975.

United's protest alleged that its bid had been unfairly evaluated, and the basis upon which the Navy determined it to be nonresponsive was unfounded.

Subsequent to United's protest being filed, the award was made to the Abbott Power Corporation.

The requirements of the IFB stated that previous experience was a prerequisite for a bid to be considered responsive. Specifically, three substations of the type to be provided, which had operated 10,000 hours during a period of less than five years, had to be verified as qualification for the IFB. "Substations" were defined by the IFB as including a 15KV and/or 5KV switchgear section, a 2,000 to 2,500 KVA transformer section, and a 480 volt, circuit protective switchgear section, assembled together as an integral outdoor type, three phase, 60 HZ substation.

Five bids were received. The low bid was from United, the second low bid from Abbott. United identified eight

substations which it felt satisfied the IFB requirements, five of which were above 2,000 KVA. These five units had operated approximately 10,000; 8,300; 7,000; 5,087; and 2,000 hours respectively, and were rated at 2,500 KVA. Since only one, not three, had been operated more than 10,000 hours, the Navy determined United's bid to be nonresponsive.

United stated that the five 2,500 KVA substations listed in its bid were units that Navy officials had told United had operated more than 10,000 hours. These had been supplied by United to the Navy on a previous contract (referred to as the -0019 contract). In this regard, United states that it queried the procuring activity to provide information necessary to comply with the IFB requirements. United was referred to a Navy field activity which, in turn, gave United the serial numbers of the five substations listed in the IFB. After bid opening, United had identified three 2,500 KVA units which had, in fact, been operated for more than 10,000 hours.

The Navy asserted that, even though United had been given erroneous information by its officials, it was incumbent upon the bidder to insure that its bid complied with the requirements of the IFB, and that late submission could not be accepted.

It should be noted that the Navy was in dispute with United over operation of the previously supplied substations. The Navy asserted that most of these units were unsafe, and required excessive maintenance.

It was noted by GAO that Abbott's units did not meet the IFB specifications either, in that the switching units were only rated at 460 volts, and not 480 volts, as required. In addition, Abbott's substations were rated at 2,000 to 2,300 KVA and paragraph 3.7.2 of the IFB specifically required no less than a 2,500 KVA rated transformer section.

In addressing the deficiencies in this acquisition, GAO first discussed the responsiveness of United's bid:

> While the Navy claims that United's listed units cannot be viewed as "successfully" operating for over 10,000 hours under paragraph C.17 due to the many deficiencies which have been listed in the Navy reports, we are not persuaded that United's units necessarily do not meet this criterion. In the absence of a contrary definition, if a substation operates over 10,000 hours within 5 years, during which time it performs functions for which it was designed, it could reasonably be concluded that the substation has operated "successfully" under paragraph C.17. Although the Navy has recently decided that United's units cannot be safely operated over 5 KV, the substations eventually listed by United apparently performed the functions for which they were designed for over 10,000 hours within 5 years. This is not to say that United could not have been rejected as a nonresponsible prospective contractor under applicable regulations, provided that the Navy could reasonably support such a determination.

As to why the United bid was nonresponsive, GAO indicated that the Navy was to blame:

> Although the Navy does not deny that its officials gave United wrong information regarding substation experience, it asserts that it was United's responsibility to prepare its bid, and that United cannot later supplement its bid in an attempt to make it responsive. However, it would appear that the operational experience of United's substations was information peculiarly within the Navy's possession, since the -0019 contract substations were scattered throughout the world in various Navy installations and that United's "nonresponsiveness" was the result of erroneous information from the Navy officials to whom United was referred by the procuring activity and upon whom United was entitled to rely.

Finally, in comparing the evaluation criteria used for the United bid as compared to the Abbott bid:

> Therefore, it would appear, from the subparagraph C.17.B. definition of "substation" that the substations listed as operating over 10,000 hours did not have to be identical to the units in the IFB purchase description. Apparently, the listed substations could vary from the basic salient characteristics of the substation called for in the IFB purchase description. The foregoing implies that the requirements were not directed at the capability of the actual "item being procured" but rather at the bidder's past demonstrated ability to deliver a successfully operating similar model.
>
> Therefore, we conclude that the Navy acted arbitrarily in rejecting United's bid as nonresponsive to the experience clause requirements when it did not reject Abbott's bid.

h.(1) Where the low bidder's nonresponsiveness to a solicitation experience clause is the result of erroneous information, peculiarly within the agency's possession, from said agency's officials upon whom the bidder is entitled to rely, the agency has acted arbitrarily in rejecting the low bid, when award has been made to the second low bidder.

(2) In the case where one bid is rejected as meeting the requirements of a solicitation, and another bid, which also does not meet all the required specifications, is accepted, the contracting agency has made an erroneous evaluation, and is in danger of being reprimanded for prejudicial practices.

i. The contracting agency was at fault--for three reasons: (1) the IFB was poorly written and ambiguous, (2) the treatment of United was obviously unfair and (3) the evaluation emanated prejudicial practices in rejecting one bid, and accepting another which was also nonresponsive.

j. GAO stated that the contracting procedures in this case were so defective that corrective action would be recommended, but for the advanced state of contract performance. (Recommendation 4)

18. Case 10. B-185515, February 24, 1976, 55 Comp Gen 798

a. Protest of solicitation

b. Invitation for Bids (IFB)

c. Atlantic Maintenance Company

d. Provide janitorial services

e. Norfolk Naval Shipyard, Norfolk, Va.

f. Solicitation errors and changes (10)

g. Atlantic Maintenance Company, Inc. protested the cancellation and resolicitation of IFB N62470-76-B-0560 for janitorial services, issued by the Norfolk Naval Shipyard on December 9, 1975.

Atlantic had protested against award on the original solicitation on the basis that the low bidder, CFE Air Cargo Company, failed to post a proper bond and should have been ruled nonresponsive.

The contracting agency, in investigating this protest, decided that CFE's low bid was a result of ambiguities in the IFB, which had to do with the bid security requirements. The cover of the bid package stated:

> Your bid must be accompanied by a bid security for 20% of the highest amount for which the award can be made.

The schedule on page 1 of NAVFAC Form 4330/24 contains the statement under the space for the grand total per month:

Bid bond required in the amount of 20% of bid.

Page 2 of the form states:

Bid bond in the amount of 20% of total bid is required.

The Navy maintained that CFE literally complied with the provisions as listed in the IFB, by submitting 20% of the monthly amount, yet the cover sheet referred to the length of the contract as twelve months, which would require 12 times the CFE bond than was posted. The Navy argued that the IFB, therefore, was ambiguous, and it was cancelled for resolicitation.

GAO did not agree with the resolicitation, and rendered the following decision:

> Section 1.C.3 states that award will be based on the grand total price of items listed on the schedule multiplied by 12. A 12-month contract was contemplated and the term "total bid" would seem to be the 12-month basis. Any reference to a "total bid" necessarily seems to have reference to the 12-month price. The legend on the cover of the bid package also clearly referred to the amount to be bid for the entire year's work.
>
> Only the statement on the schedule poses a problem. The statement that the bid bond was required to be 20 percent of "bid" might be interpreted as the Navy would have it, if one were to look only at the schedule. If the schedule were considered in isolation, the statement, "bid bond required in the amount of 20% of bid" might itself be ambiguous in that a reader could interpret the statement to refer to the grand total price for 1 month or the price for the 12-months of performance. However, in the context of a bid package which contemplates a 12-month contract, which indicates award will be made on 12-month basis and which contains two other references to a "total bid" and a third to a highest amount for which award can be made, it seems that the word "bid" in the statement on the face of the schedule must be the "total bid" in context, I.E., the total price bid for the 12-month award. That this conclusion is reasonable is supported by the fact that three out of four bidders on this IFB submitted bid bonds equal to 20 percent of the full 12-month price. Accordingly, we conclude,

contrary to the agency, that no ambiguity existed in the bid documents when viewed as a whole.

As the above decision required reinstatement of the original solicitation, the matter of CFE's responsiveness was considered:

> With respect to the initial allegation of Atlantic that the bid of CFE was nonresponsive, we note that CFE provided a cashier's check for 20 percent of 1 month's price or $13,330, in lieu of a bond for that amount. We also note that 20 percent of the total bid of CFE, I.E., 20 percent of the monthly price multiplied by 12, would amount to $159,937.61. Thus, the guaranty proffered by CFE was significantly less than the requirement. In such situations we have held that the failure of a bid to comply with the bid guarantee provisions requires the rejection of the bid as nonresponsive and that the failure may not be waived or otherwise excused. [15]

h. When a solicitation document specifies a definitive periodicity for the subsequent contract, with a bid security required, and the solicitation contains references to both monthly and total bid securities, the solicitation is not necessarily ambiguous, and the bid security must be posted for the entire period of the contract, or the bid is to be rejected as nonresponsive.

i. The contracting agency erred in its recall of the initial solicitation, because bid securities must always be based upon the total time period involved, and the security value will be some fixed percentage specified in the solicitation document, of the total price. The contractor, CFE, erred by knowingly submitting a bid security which related only to one month of the 12-month period of the contract specified in the IFB.

j. Two decisions were required of GAO. First, the original solicitation was to be reinstated (Recommendation 10) and secondly, in reverting back to the original bids, CFE had to be considered nonresponsive. (Recommendation 7)

19. Case 11. B-189073, October 7, 1977

a. Bid protest

b. Invitation for Bids (IFB)

c. Regional Construction Company, Inc.

d. Construction of a warehouse

e. U. S. Army Corps of Engineers. Omaha, Nebraska

f. Affirmative Action criteria (11)

g. Regional Construction Company, Inc. protested the rejection of its bid as nonresponsive on IFB DACA45-77-B-0034, issued by the U. S. Army Corps of Engineers, Omaha. The IFB solicited construction of a warehouse at O'Hare International Airport, Chicago. Regional's bid was rejected because it failed to submit minority manpower utilization goals, which were required by the IFB in accordance with the Chicago Plan, a mandatory Affirmative Action plan imposed by the Department of Labor.

Regional argues that its bid was responsive, and that as lowest bidder it should have been awarded the contract. Although Regional did not submit a separate sheet, listing its percentage goals for minority manpower utilization as required by the IFB, it did express a commitment to the Chicago Plan in a letter accompanying the bid.

The issue is whether, or not, the agreement to implement the Chicago Plan was a commitment to the requirements of the IFB.

GAO determined that since Regional agreed to abide by Amendment 3 of the IFB, it was in compliance. Amendment 3 states that:

> Bidders are reminded that bids are to be accompanied by an affirmative action plan (Chicago plan).

This amendment, by definition referred to the Chicago Plan, which was included in the IFB beginning on page one.

Thus, the requirements of the IFB, and a commitment to the Chicago Plan are one and the same thing. GAO ruled Regional's bid to be responsive, and identified some past precedents:

> Bidder can commit itself to the requirements of an affirmative action plan in a manner other than that specified in the solicitation as long as the bidder manifests a definite commitment to those requirements. [12]

> This is true despite the fact that solicitations, such as the one in the instant case, often contain statements which warn bidders that failure to comply with a particular requirements will result in the rejection of their bid as nonresponsive. We have determined that such statements often establish the materiality of that requirement, but that the requirement is not necessarily material solely because it is accompanied by that warning. [25]

h. Failure of a low bidder to submit a separate sheet listing percentage goals for minority manpower utilization, does not render a bid nonresponsive, when the bidder submits a letter attached to the bid expressing a commitment to an Affirmative Action Plan which contains such goals. The issue of responsiveness is measured by the bidder's

commitment to a plan, and not by the bidder's failure to accurately follow instructions of an IFB.

i. The error contained in this case bears upon the contracting agency's insistence on procedure, instead of a commitment to the requirements of the IFB, and Governmental interests in minority manpower utilization. Regional, in committing to the Chicago Plan, had complied with the spirit of affirmative action, if not to procedural requirements, which is exactly the point of including the requirement in the IFB, in the first place.

j. GAO recommended reinstatement of Regional's bid, with subsequent award, as Regional was the lowest responsive bidder. (Recommendations 8 and 3)

20. Case 12, B-183957, October 6, 1975, 55 Comp Gen 352

a. Award protest

b. Invitation for Bids (IFB)

c. Commercial Sanitation Service

d. Refuse Collection and Disposal service

e. Department of the Army, Fort Carson, Colorado

f. DAR revision required (12)

g. Commercial Sanitation Service protests the rejection of its bid as nonresponsive, under IFB DAKF06-75-B-0106 issued by the Department of the Army on March 7, 1975, for refuse collection and sanitation service. Commercial submitted the low bid of $187,962 with a prompt payment discount of 8%, if payment was made within 30 days. This reduced the bid to $172,925. Dynamic International submitted the next

lowest bid of $196,500 with discount of 10%; effective price, $176,850.

The IFB required each bidder to post a bid guaranty of 20% of its bid price. Commercial posted $34,585, and was subsequently ruled as nonresponsive by the contracting officer, for failure to submit a sufficient bond. The implication was that Commercial's bond should have been in the amount of $37,592.40, which was 20% of its bid price before discount.

Commercial contended that if the net bid after discount were the basis for the award, then that figure should also be the basis for the bid bond.

The contracting activity took the position that term discounts must be earned and not assumed.

Commercial refuted the agency by quoting DAR:

> Any discount offered shall be deducted from the bid price if a prompt payment discount is offered for payment within 20 days. [38:2-407.3(B)]

Since, per DAR, the bid was to be evaluated on the discount price, the above argument for Commercial still holds.

GAO had never reviewed a case of this nature before, but agreed with the contractor. Referring to the DAR clause previously stated, GAO noted that the offered discount forms part of the award price, and therefore should be considered in the bond requirement.

A further ramification of this case, identified by GAO, was whether the contracting officer could have found another solution. Again, DAR is drawn upon:

Non-compliance with bid guarantee requirements. When a solicitation requires that bid be supported by a bid guarantee, non-compliance with such requirement will require rejection of the bid, except that rejection of the bid is not required in these situations.

When the amount of the bid guarantee submitted, though less than the amount required by the IFB, is equal to or greater than the difference between the price stated in the bid and the price stated in the next higher acceptable bid. [38:10-102.5(II)]

The Army position is that this exception is discretionary upon the contracting officer.

GAO has ruled that:

Absent a specific finding, which was not made here, that a waiver of the requirement was not in the best interests of the Government, the bid should not be rejected if it falls into the stated exception. To rule otherwise would permit unbridled discretion to totally defeat the purpose of the exception and allow its employment as a substitute for rejecting bids for unrelated reasons such as nonresponsibility determination.

It is our view that since the failure of the bid to comply fully with the invitation requirements falls within one of the exceptions enumerated in ASPR, and there was no finding that its acceptance would in any way be detrimental to the best interest of the Government, or prejudice the rights it would otherwise have, the low bid should be regarded as responsive.

h. Two major lessons learned emerge from this case:

(1) Since DAR provides that prompt payment discounts be deducted from the bid price on the assumption that the discount will be taken, and the offered discount will affect the award price, the amount of the required bid bond may properly be based upon the discounted bid price.

(2) DAR gives contracting officers discretionary authority to decide if bid bond deficiencies should be waived, but such discretion was intended for application within definite rules. Consequently, unless not in the best

interests of the Government, and the bid falls into the DAR exception for bid guarantee, the exception should be utilized.

i. The protest occurred as a result of DAR language, and existing procedures. No case of this nature had ever been reviewed by GAO, and operating procedures in relation to bid bond prices, when discounts are involved was not, at best, discretionary. A GAO determination within the body of this case has solved that dilemma. The use of the bid bond exception in DAR, which could have been used to satisfy this case, is discretionary as written. The language should be changed so that use of the exception is mandatory. The aim here is to maintain consistency in practices, which is a great deterrent to further protests.

j. GAO recommended termination of the present contract, and award to the protestor. (Recommendations 1 and 3)

Additionally, a recommendation was submitted to the DAR committee of the Department of Defense, recommending that the language of DAR section 10-102.5 be revised so that it is no longer discretionary on the part of the contracting officer whether to accept a bid, if the bid bond is deficient, but falls within one of the enumerated exceptions. (No recommendation number, since it does not directly affect the contract.)

21. Case 13. B-187113, November 24, 1976

a. Award protest

b. Request for Proposals (RFP)

c. Fordel Films Inc.

d. Production of a motion picture

e. Navy Regional Contracting Office (NRCO), Washington, D.C.

f. Negotiation prior to submittal of best and final offers (13)

g. Fordel Films Incorporated protested the award of a contract under RFP N 00600-76-R-5377, issued by NRCO, Washington, D.C., for production of a motion picture.

Fourteen proposals, each with a fixed price offer, and a cost breakdown were received by April 23, 1976, the closing date. Production House Inc., the eventual awardee, submitted an offer of $22,850, which was further reduced to $19,940 by a proper modification. On April 26, in a telephone conversation, NRCO requested Production House to explain the modifications, which led to further reductions and more conversations, eventually resulting in a bid price of $19,345. At the same time, Fordel was requested to confirm its $21,289 offer, so that, as the second low offeror, prompt award could be made to it, should Production House prove to be nonresponsible. Fordel confirmed its price, but acknowledged the omission of certain costs in its proposal. Award was made to Production House for $19,345, on April 29.

Fordel's protest alleged that all price reductions made by Production House after its initial bid of $22,850 were made by telephone, contrary to the solicitation requirements, and that award should have been made to Fordel for its bid price of $21,289.

The contracting agency admits that the negotiations were improper. However, at the time the telephone conversations occurred, agency personnel did not view them as negotiations, but merely as corrections and clarifications which did not require requests for best and final offers.

Both GAO and NRCO agreed that these discussions did, in fact, constitute negotiations with Production House, that best and final offers should have been requested, and that award should not have been made without requesting such offers.

h. Telephone conversations in a negotiated procurement should not be used as a vehicle for negotiation, prior to requests for best and final offers. A series of clarifications of price modifications can take on this aspect, and must be guarded against.

i. The negotiator and contracting officer were at fault in not requesting best and final offers from both contractors, and then negotiating. As this case evolved, price modification clarifications resulted in lowering of the Production House bid, and were essentially negotiations. The end result was that Fordel was, unintentionally, but effectively, underbid as a result of negotiations conducted with Production House prior to submittal of best and final offers from either firm. It is also possible that through proper negotiations, a lower price may have been attained by the Government.

j. GAO recommended that the award stand, since it was made in good faith to the low bidder, was more than 75% complete, and the protestor was allowed to submit a final offer. But, both NRCO and GAO were in agreement that the negotiations conducted prior to requesting best and final offers were improper. (Recommendation 4)

22. Case 14. B-184451, B-184394, June 1, 1976

a. Award protest

b. Invitation for Bids (IFB)

c. Kepner Plastic Fabricators, Inc.

d. Provide floating oil containment booms

e. Naval Facilities Engineering Command, and Naval Sea Systems Command, Washington, D.C.

f. Required certifications (SBA, ICC, etc.) (14)

g. Kepner Plastic Fabricators, Inc. protested the award of a contract to Max-Vac, Inc., under IFB N62578-75-B-0139 issued by the Naval Facilities Engineering Command (NAVFAC), or under IFB N00024-75-B-4602, issued by the Naval Sea Systems Command (NAVSEA), for oil containment booms.

On June 11, 1975, bids were opened by NAVFAC, and Max-Vac was determined to be the low bidder at $184,826.30, with Kepner second lowest, at $208,707.80.

In response to IFB 4602 (NAVSEA), Max-Vac, again was low at $84,600, and Kepner was second low at $99,900. A pre-award survey team recommended that no award be made to Max-Vac because of inadequate financial resources. Because Max-Vac was a small business concern, such a determination

had to be made by the Small Business Administration (SBA), The SBA subsequently issued a Certificate of Competency (COC) reflecting the determination that Max-Vac possessed adequate capacity and credit to perform.

Kepner has protested against award to Max-Vac stating, in part, that Max-Vac has never produced the items involved, that Max-Vac's bid should be considered nonresponsive, since it was unable to supply "Regular Commercial Products" as specified in the IFB, and that Max-Vac is nonresponsible for lack of experience.

The concerns of Kepner were also the concerns of the procuring commands. NAVFAC states:

> The oil booms to be produced under its invitation are essential in that they will be used to contain oil spills occurring in rivers, lakes, harbors, and even the open ocean. Failures in the booms could result in spilled oil not being contained, with widespread diversion of the spillage and consequent substantial damage to the environment and wildlife.
>
> Completely separate and apart from the question of whether or not any firm is responsible, NAVFAC has determined that it is so essential that any oil booms purchased operate satisfactorily, that it cannot be the GUINEA pig for a hitherto untested product. NAVFAC would take this position even in a case where the low bidder has unquestionable capacity and financial resources to accomplish the manufacture.

Conversely, NAVSEA states that the "Regular Commercial Product" clause:

> Was included in the specification to assist in assuring that only a capable, qualified manufacturer would be selected. As such, question of whether the product offered is a regular commercial one relates to the responsibility of the bidder rather than to responsiveness.

NAVSEA suggested that award to Max-Vac would therefore be proper, since that company had been determined to

be responsible by the SBA. NAVFAC did not agree, and expressed great concern that the product produced might be inadequate, regardless of the capacity or financial resources of the firm, and that, therefore, the issue was responsiveness, and not responsibility.

GAO was more inclined toward the NAVFAC point of view:

> It is clear that Max-Vac's unqualified bid obligates that firm to provide a "Regular Commercial Product." In this connection, we do not agree with NAVSEA's suggestion that award to Max-Vac would be proper even if it could not furnish a commercial product. A willingness to proceed with awards under these solicitations even if a bidder cannot supply a "Regular Commercial Product" would indicate that the "Standard Product" clause was unnecessary. [13]

GAO expressed further concern that perhaps the COC issued by SBA did not address the matter of responsiveness at all. This matter would be critical in the selection of any awardee:

> Under these circumstances, cancellation of the solicitation and readvertisement without the clause would be in order. In fact, the SBA has issued a COC which reflects a determination by that agency that Max-Vac has the "capacity" to manufacture these oil containment booms. It is not clear from the record, however, to what extent SBA considered the "Standard Product" clause in making its determination. The referral to SBA for a COC was prompted by doubts as to Max-Vac's financial condition, and it does not appear that the firm's ability to comply with the "Standard Product" clause was an issue at that time. It was not until Kepner filed its protest before our office that this issue was developed.

h. Two essential lessons are learned from this case. Both address the responsibility and responsiveness issues raised:

(1) If the record does not reflect the extent to which the SBA considered "Regular Commercial Product"

requirements of a solicitation in issuing a COC to a bidder, and only the bidder's financial status was in question at time of COC referral, then contracting agencies should ask SBA to reconsider its issuance of a COC, if the bidder's capability to meet the solicitation requirement had not been examined previously.

(2) A small business' unqualified bid obligates that firm to provide a "Regular Commercial Product" as required by the solicitation. Award to that bidder must be preceded by a determination that the bidder will offer a "Regular Commercial Product." If an agency's needs can be met by other than a "Regular Commercial Product," the requirement was unduly restrictive and the acquisition should be readvertised without it.

i. The problem identified in this case has to do with SBA determinations, and contracting agencies and officers' concerns. If a small business requires SBA certification, it is incumbent upon the contracting personnel to insure that the SBA obtain the correct determination. As in this case, a determination of responsiveness is unacceptable, if only a determination of responsibility will suffice. Communication between contracting and SBA personnel is imperative.

j. GAO recommended that the Procuring Agencies contact the SBA, and get a determination of responsibility for Max-Vac. (Recommendation 6)

C. SUMMARY

This chapter focused on 22 cases which had been identified as representative of the population of protests reviewed and sustained by GAO. Each case represented a unique protest reason, and was evaluated as an example of the cases contained within each of the 22 different categories and sub-categories.

The results of this analysis will be further developed in Chapter V as lessons learned, or conclusions.

V. ANALYSIS OF THE RESEARCH QUESTIONS

A. PREFACE

Twenty-two selected cases which GAO had sustained as a result of their protest reviewing process were presented and analyzed.[2] All of these cases emanated from the DOD acquisition and contracting process during the years 1975 through 1978. Drawing from the research accomplished for these efforts, the following two subsections will consolidate the accomplishments of this study through the research questions which served to direct the analysis.[3] In subchapter V.B. the emphasis was to determine if an analysis could be conducted from which meaningful conclusions could be drawn which had the potential to reduce future protests. The follow-on question, presented as subchapter V.C., was to determine what conclusions, or lessons learned, could be derived from such an analysis.

B. DISCUSSION OF RESEARCH QUESTION 1

The thrust of this study was presented in the following form: CAN MEANINGFUL CONCLUSIONS AND LESSONS LEARNED BE DRAWN FROM A SYSTEMATIC ANALYSIS OF SUSTAINED GAO PROTEST DECISIONS?

It is believed that meaningful conclusions can be drawn for the acquisition process using the methodology of this study. Each of the 22 cases analyzed provided

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[2] Subchapter IV.B Case Analysis

[3] Subchapter I.B. Objectives and Research Questions

insight into trends of causes, which permeate all the categories of protest. It is the identification of these trends that has the most potential value in reducing the quantity of protests. References such as DAR and Government Contract Law (GCL) give guidance to the acquisition process, but they cannot provide the day-to-day practical lessons to be learned, that a study such as this can provide. The individual application of GAO decisions to real world situations, communicates to the acquisition manager the dynamics of the acquisition process. It more clearly defines for him what he, as an individual, can or should do to improve the process. Reduction in the number of protests is but one of those improvements.

The following lessons are offered in support of this research question:

1. Lesson 1

Nine of the 22 cases contained elements of overly strict, or arbitrary interpretations on the part of contracting personnel. In most cases, these interpretations directly resulted in a very negative recommendation by GAO, which impacted upon the contracting agency concerned.

Case 1b illustrated a good example of an agency attempting to stretch a previous GAO decision in its determination of responsiveness on a bid. Extension of the GAO decision to option quantities had never been intended, and was found to be at fault.

Case 1c identified another determination of responsiveness question. In this case, the total bid was clear, but the agency placed unnecessary emphasis on the ambiguous unit prices, creating work for itself, and alienating a responsive bidder.

Case 3b dealt with a determination of nonresponsiveness because the bidder added more to its bid than necessary. Again, a perfectly good bid was thrown out, until GAO reinstated it.

Case 5a had to do with use of an overly restrictive interpretation, in order to cover up an agency error, directly causing a bid protest.

Case 8a was unique in that it dealt with a BOA rather than an IFB or RFP. The result, however, was the same. Overly strict interpretation of a DAR clause led to elimination of a surplus supply part bidder, who was subsequently determined by GAO to have the right to bid on such a contract.

Case 8b was an excellent illustration of an agency closing its ears to higher authority and proceeding, using a subservient regulation as authority, which was in direct conflict with higher regulation authority. This action led directly to a protest which GAO subsequently sustained.

In Case 8d, the agency erroneously used urgency of the requirement as a basis for sole-source negotiation. The conclusion of this case is extremely interesting, in that the action of the agency actually created a delay in obtaining the urgent material. Some viable sources were eliminated by

the sole-source determination, which could have provided the needed supplies in a shorter period of time.

Case 11, dealing with affirmative action, clearly showed the narrow-mindedness of the agency's actions. Strict adherence to a procedure, deemed absolute, nearly eliminated several responsive bidders who had, by definition of GAO, complied with the IFB by indicating their commitment to the Affirmative Action Plan specified in the solicitation document.

Lastly, Case 12 showed yet another example of a contracting agency eliminating a responsive (in fact, the low) bidder by unfounded adherence to an arbitrary decision allowed by DAR.

2. Lesson 2

The exercise of prudent business practices by contracting personnel, coupled with a fundamental knowledge of the contracting process and contract law, are necessary ingredients for successful acquisitions. Seven cases emerged from which these fundamentals were absent and protests resulted.

Case 1b illustrated the point in reference to determining a bid to be responsive, when no consistent pricing pattern exists. A prudent business or common sense approach would have indicated otherwise.

In Case 1c, adherence to demanding that unit prices be unambigious, when a valid total price had been submitted by the bidder, and the subsequent award was to be made on the total price bid, appears wasteful.

The lack of good business management in Case 8d was not only imprudent, it was a flagrant violation of DAR procedures. Failure to issue RFP's to interested parties, after a sole-source determination is listed in the CBD, contravenes the DAR and represents complete disregard for the contractors' interests.

In Case 9, the contracting agency treated United Power and Control Systems, Inc. unfairly, because previous experience with this company had created a strained relationship.

In Case 10, the contracting agency withdrew a valid IFB, thinking that an ambiguity in the solicitation document in regard to bid bonds confused the bidders. Knowledge of the fact that bid bonds must be posted for the entire period of the contract to be awarded, regardless of the IFB provisions, would have prevented an unnecessary action, which resulted in a protest to GAO.

The action of the contracting agency in Case 11 was a manifestation of procedural mentality overriding the benefit to be derived from having contractors commit to affirmative action programs. Fifty percent of the qualified bidders were considered nonresponsive, merely because they did not follow the step-by-step, methodological approach elicited in the IFB. In this case, however, GAO exhibited the good business sense to reverse the agency's nonresponsive determinations.

In Case 11, negotiations were conducted by telephone, under the guise of price modifications and clarifications, prior to requests for submittals of best and final offers.

3. Lesson 3

Eight cases were identified which exhibited inconsistencies in dealings with various contractors. Other terms which are often heard represent these inconsistencies: Failure to maintain a competitive balance; lack of fair and equitable treatment; not presenting a single face to industry; and discrimination. Of the eight cases, three are representative of the others.

In Case 3a, use of one of the bidder's drawings as a design requirement in the IFB, clearly discriminated against all other offerors.

In Case 5c, the contracting officer had erroneously released bid prices of one bidder to another. Recognizing this, he was then walking a tightrope in trying to maintain a competitive balance. In the end, he failed, even though he made good efforts not to.

Case 13, previously mentioned, dealt with negotiation by telephone, prior to requests for best and final offers. This practice also led to unbalanced competition, and favored the company with whom the negotiations were, inadvertently, conducted.

4. Lesson 4

Six major contracting errors were noted, all of which were the root cause of the associated protests. Two of the cases, 3b and 7, represent the thrust of these errors.

In Case 3b, the contracting agency rejected a perfectly valid bid, because the bid contained more information than was required in the solicitation. However, if the contract were awarded to this offeror, he would be bound by the provisions of the solicitation anyway. This is an obvious error.

In Case 7, the contracting officer made a nonresponsive determination, based upon a study which contained erroneous assumptions. This is a good example of a contracting "team" error.

5. Lesson 5

Lack of control of the contracting team, by the contracting officer, can also cause protests. Case 7, already mentioned, represents the outer fringes of the problem. Two other cases, however, represent control situations much closer, within the contracting officer's realm of influence.

In Case 3b, a survey team member told the contractor, Nordham, to submit a proposal including the honeycomb coring. Later, this same member advised the PCO that Nordham's bid was nonresponsive, because it was not contained within the prescribed limits of the IFB.

In Case 9, although his actions may have been agency induced, the Navy representative called upon to provide serial numbers of substations which had successfully operated for 10,000 hours, in support of United's current bid, supplied information which was erroneous.

6. Lesson 6

Twice within this study, it was determined that protests will occur unless GAO decisions are disseminated to the contracting agencies as quickly as possible.

In Case 4, no agency nor person was to blame for the protest. GAO recommended that the agency pursue the meaning of the recent ICC Bud's decision with regard to agents' Certification of Operating Authority, if the parent company is licensed and the subsidiary is not. This decision was the basis for the protest, and dissemination of this case made the information available to all the contracting agencies.

In Case 12, GAO discussed the subject of bid bonds based upon discounts. Since this was a completely new area of endeavor for GAO, no past precedent existed. This decision by GAO is, in fact, a deterrent to future protests of this nature.

7. Lesson 7

Poor and lethargic management practices or policies were identified as the root cause for three protests.

In Case 9, the FAMC mail policies were allowed to continue, even though late bids would result. In Case 8d, MICOM's obvious disregard for the DAR provisions, and its adherence to negotiating a sole-source contract, represent a very poor management example. Both were detrimental to the agency; the first to its image, the second to the integrity of the contracting mechanism and, ironically, to the expediency of the urgently required acquisition.

8. Lesson 8

Poor communications contributed to the submittal of protests in three cases. Two of these are representative.

In Case 7, a communication failure allowed an exacting study to be conducted, which ultimately was the basis of a nonresponsive determination, which was based upon an erroneous assumption. Failure to communicate properly between contracting officer, the study team, and the contractor resulted in wasteful efforts for all, and a delayed contract award.

In Case 14, the failure of the contracting agency to communicate with the SBA, resulted in a determination of responsiveness only when a determination of responsibility was also needed.

9. Lesson 9

The need for improved regulations and procedures was the basis for protests in four cases.

Cases 6 and 12 resulted from needed changes in the DAR which emerged as GAO recommendations.

Case 5b resulted from poor mail policy at FAMC, previously mentioned, which created a late bid situation.

Case 8c addressed the Navy's reluctance to use Restricted Formal Advertising for mess attendant service contracts, even though GAO had directed this change, and both the Army and Air Force had previously done so to eliminate the large protest volume resulting from negotiated procurements.

C. DISCUSSION OF RESEARCH QUESTION 2

The second research question expands upon the first, and attempts to transform the lessons learned into useful recommendations: CAN THESE CONCLUSIONS AND LESSONS LEARNED BE TRANSFORMED INTO RECOMMENDATIONS WHICH, WHEN TRANSMITTED TO ACQUISITION MANAGERS, HAVE THE POTENTIAL TO DECREASE FUTURE PROTESTS AND IMPROVE THE ACQUISITION PROCESS?

It is believed that such recommendations can be formulated. They are the subject of Chapter VI.

VI. RECOMMENDATIONS AND SUMMARY

A. PREFACE

Many imperfections in the acquisition and contracting process have been identified by this study. In an attempt to improve this process, recommendations based upon the criticisms and lessons learned portions of this thesis, Chapter IV, and particularly, upon the nine lessons learned presented in the form of conclusions, Chapter V, will be presented. These recommendations are of a general nature, and are to be applied broadly. This is so, because the conclusions drawn are not specific, and cannot be solved by specific cures. In this chapter, areas requiring further research are identified. There are some interrelationships between recommendations, but only insofar as the conclusions from which they are drawn are also interrelated.

B. RECOMMENDATIONS

1. Recommendation 1

It is recommended that Acquisition Managers focus on improving communications, both within, and without their organizations. This study identified many instances in which poor communication was the root cause of the ultimate protest. Communication defined herein includes both education, and open flows of information.

Specifically, Government Acquisition Managers should: maintain close information exchanges between contracting team

members, the contractors, and themselves, both within and without their agencies; insure that new acquisition policies formulated by Public Law, GAO and other Governmental Agency decisions, are distributed in a timely manner; and maintain an open dialogue with support agencies, such as SBA.

This research has shown a need for protest review information to be disseminated to Acquisition Managers, so as to improve the acquisition process. Unfortunately, the present information available is not presented in the proper language for this purpose. It is highly recommended that case reviews be made available to the Acquisition Managers in language such as that utilized within this study, and not in the legal language understood fully, only by attorneys.

2. Recommendation 2

It is recommended that Acquisition Managers strive to operate at all times on a fair and equitable basis with all contractors.

This study uncovered many instances in which this ideal was violated, and has identified the following specific areas requiring attention: arbitrary and overly strict interpretations, those which have resulted from influences within the contracting processes as specified in DAR, must be avoided; attempts must be made to understand the problems and motivations of the contractor; and in order to be able to measure exactly what is fair and equitable, Acquisition Managers must learn the basics of their profession and seek out assistance when it is needed.

3. Recommendation 3

It is recommended that Acquisition Managers continuously attempt to improve upon current policies, interpretations and procedures, to eliminate those which prove counterproductive, or are in conflict with one another. Lessons learned 8 and 10 defined the basis of this recommendation.

Specifically, those regulations in DAR which are found to be lacking, must be rewritten. Organizational or Agency policies which cause detrimental results within the acquisition process must be eliminated, or if necessary for other purposes, modified. Regulations of differing Governmental Agencies which are in conflict and affect the acquisition process, must be brought into agreement. Poor or lethargic management practices at any level must not be tolerated.

It is further recommended that when policy and regulation changes are specified by GAO to individual agencies or committees, that those activities be required to report implementation compliance to GAO, when completed.

4. Recommendation 4

It is recommended that the following areas related to this study be explored, to potentially increase understanding and knowledge of the acquisition process:

a. Sustained protests of agencies other than DOD.

b. Protest appeals to the courts.

c. Protests reviewed by individual Procuring Agencies.

d. The impact of protests from the contractor's viewpoint.

e. Denied, dismissed, or withdrawn protests.

f. Specific mechanisms for incorporating lessons learned into the acquisition process.

g. Investigation into improvements of the available protest data bases.

h. Updating of this study to the current date.

This list is not exhaustive. It presents some areas which, at present, appear to be fertile ground for further original research, related to the general subject of this study.

C. SUMMARY

GAO protest reviews are a source of very beneficial information which can improve the acquisition process. GAO decisions are currently added to legal data bases used by lawyers and by contracting personnel. The best potential use of these decisions, for PCO's, is in deciding what actions have become accepted, in the past, which bear upon present or future contracting problems. The purpose of this study was to analyze sustained GAO protest reviews and to determine if meaningful conclusions could be established, in the form of lessons learned. Much additional research would be beneficial in this general area. Specifically, sustained protests of agencies other than the Department of Defense, reviewed by GAO, and sustained protests reviewed by individual contracting

agencies within DOD, are promising avenues of further research which have the potential to further refine the acquisition and contracting processes.

BIBLIOGRAPHY

1. Annual Report of the Comptroller General of the United States, U. S. General Accounting Office, Washington, D.C., 1970.

2. Op. Cit., 1971.

3. Op. Cit., 1972.

4. Op. Cit., 1973.

5. Op. Cit., 1974.

6. Op. Cit., 1975.

7. Op. Cit., 1976.

8. Op. Cit., 1977.

9. Commission on Government Procurement, Report of the Commission on Government Procurement, Volume 4, Washington: Government Printing Office, 1972.

10. Comptroller General Decision, Unpublished, B-157176, August 30, 1965.

11. Op. Cit., B-167369, September 18, 1969.

12. Op. Cit., B-174932, March 3, 1972.

13. Op. Cit., B-177197, April 4, 1973.

14. Op. Cit., B-177317, December 29, 1972.

15. Op. Cit., B-183082, Sprague Batavia Inc., 75-1, CPD 194, April 2, 1975.

16. Op. Cit., B-185034, A. C. Bell Company, 76-1, CPD 249, April 13, 1976.

17. Op. Cit., B-185366, Modern Moving and Storage Co., 76-1 CPD 338, May 24, 1976.

18. Op. Cit., B-187795, 77-2 CPD 284, October 12, 1977.

19. Op. Cit., B-190562, I. T. S. Corporation, 78-1 CPD 64, January 24, 1978.

20. Comptroller General Decision, 49 Comp Gen 107, (1969).

21. Op, Cit., 50 Comp Gen 209, (1970).

22. Op. Cit., 51 Comp Gen 528, (1972).

23. Op. Cit., 52 Comp Gen 604, (1973).

24. Op. Cit., 52 Comp Gen 955, (1973).

25. Op. Cit., 53 Comp Gen 451, (1974), Barthly Incorporated, 74-1 CPD 1.

26. Op. Cit., 53 Comp Gen 656, (1974), ABC Management Service.

27. Op. Cit., 53 Comp Gen 771, (1974), East Bay Auto Supply, 74-1 CPD 193.

28. Op. Cit., 54 Comp Gen 66, (1974), Central Metal Products, 74-2 CPD 64.

29. Op. Cit., 54 Comp Gen 96, (1974), Comdisco Inc., 74-2 CPD 152.

30. Op. Cit., 54 Comp Gen 231, (1974), California Microwave Inc., 74-2 CPD 181.

31. Op. Cit., 54 Comp Gen 835, (1975), Kenneth R. Bland, 75-1 CPD 207.

32. Federal Property Management Regulations, Washington: Government Printing Office, 1975.

33. Government Contract Law, 4th ed., U. S. Department of the Air Force, Air Force Institute of Technology, 1975.

34. Prestex vs. United States, U. S. Court of Appeals, F. 2D 367, 1963.

35. Le Fave, Joel J, The Procurement Protest, Air Command and Staff College, Maxwell AFB, Alabama, May 1975.

36. United States Code, 31 U. S. C. 71 (1970).

37. United States Code, 31 U. S. C. 74 (1970).

38. U. S. Department of Defense, Defense Acquisition Regulations, Washington: U. S. Government Printing Office, 1 July, 1976.

39. U. S. General Accounting Office, Comptroller General of the United States - Purposes - Functions - Services, Washington: U. S. Government Printing Office, 1973.

40. U. S. General Accounting Office Regulations, Title 4, Chapter 1, Part 20, 1972.

41. U. S. Interstate Commerce Commission Decision, Bud's Moving and Storage, Inc. Petition for Declaratory Order, 126 M.C.C. 56, 1977.

42. United States Senate, 96th Congress, 1st Session, The Federal Acquisition Reform Act, Senate Bill S-5, U. S. Senate, January 15, 1979.

43. Webster's New Collegiate Dictionary, G & C Merriam Company, 1975.

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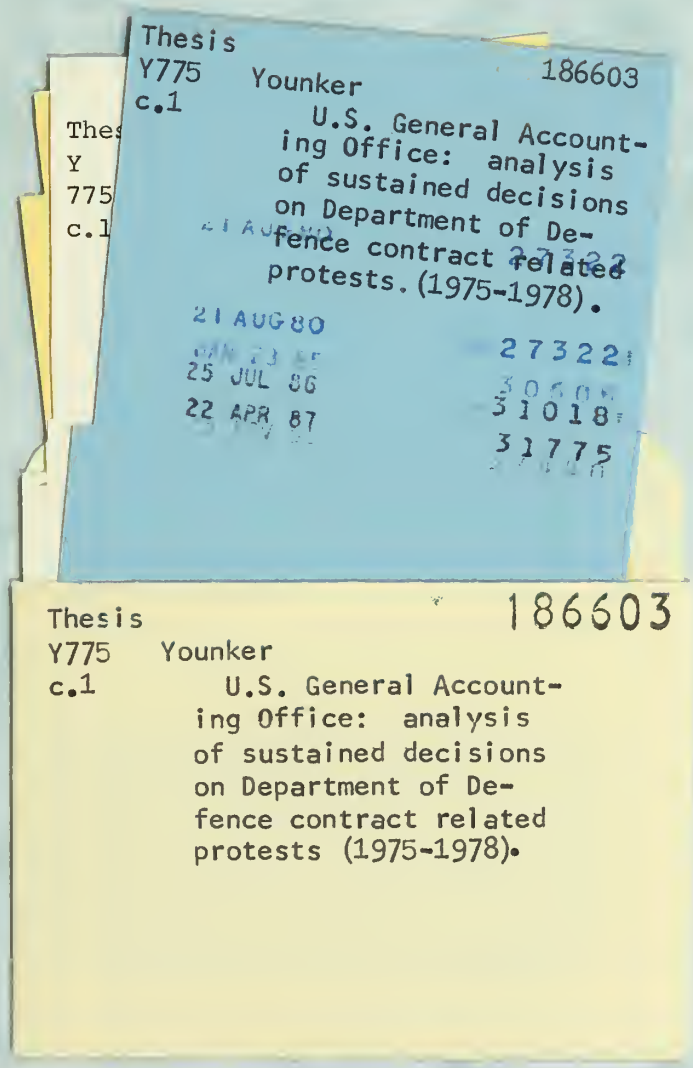

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